1998

Chris Swanson and Laurie Swanson v. Beverly Swanson, Clinton Swanson, Nikki Shumway, dba Swanson Enterprises : Brief of Appellant

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.
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Chris Swanson; Laurie Swanson; Plaintiffs/Appellants; Pro Se.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON,

Plaintiffs and Appellants,
PRO SE

vs.

BEVERLY SWANSON, an individual, and CLINTON SWANSON, an individual, and NIKKI SHUMWAY, an individual, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah Business,

Defendants and Appellees.

APPELLANTS' BRIEF

PRO SE

Case No. 980285-CA

Priority 29(b)(15)

APPEAL FROM A RULING ON JUDGEMENTS IN THE

FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH

THE HONORABLE ANTHONY W. SCHOFIELD, JUDGE

Chris Swanson and
Laurie Swanson
Plaintiffs/Appellants
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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS BELOW

This appeal is from two Judgments, the first a Partial Summary Judgment (see Addendum A.) entered December 10, 1996, in favor of the Individual Defendants, the second, a Judgment (see Addendum B.) entered on or about May 13, 1997, in favor of the Corporate Defendant, Swanson Enterprises, Inc., and a Ruling (see Addendum C.) on the Appellants' 60(b) Motion to Set Aside entered October 10, 1997, which also certified the Judgment(s) as final, pursuant to Rule 54(b) U.R.C.P. All of the foregoing actions were in the Fourth District Court of Utah County, State of Utah. The Utah Supreme Court had appellate jurisdiction and accepted our Notice of Appeal (see Addendum D.) pursuant to U.R.A.P. On May 28, 1998, pursuant to the authority vested in The Utah Supreme Court, this case was poured over to the Utah Court of Appeals, (see Addendum E.) which also has jurisdiction under U.R.A.P. An Order was issued (see Addendum F.) by the Utah Court of Appeals on July 13, 1998, withdrawing a prior Sua Sponte Motion for lack of jurisdiction, and Appellants were notified to file this brief on or before August 24, 1998.

STATEMENT OF ISSUES

1. Should the District Court have granted Plaintiffs' Motion to Set Aside Judgment under Rule 60(b)(1) and (7-now-6) pursuant to the following subissues:

(a) Was relief from the December 10th 1996 Judgment in favor of the individual Defendants available to the Plaintiffs, Chris & Laurie Swanson, under Rule 60 (b)(7-now-6).

(b) Was there sufficient evidence of a meritorious defense to the counterclaims by the Defendants before the Court.

(c) Were the actions of the Plaintiff's counsel so egregious that they were beyond excusable neglect, constituted fraud, malpractice, and gross negligence, and therefore attorney Stringer's actions should not be imputed to Chris & Laurie Swanson.

(d) Were the Plaintiffs' and Appellants', Chris & Laurie Swanson's, actions reasonable and did they show due diligence in their pursuit of this case.

(e) Did the District Court err in not allowing Chris & Laurie Swanson's subsequent attorney, Mr. Jerry Schollian, to fully argue and present the evidence before the Court.

(f) Did the District Court err in not allowing three Affidavits (see Addendums G., H., I.) presented on the day of the Joint Hearing to be entered as evidence or argued before the Court, although the Court referred to those Affidavits in it's Ruling as justification for the Court's decision.

(g) Was the 60 (b) Ruling an abuse of the Court's discretion in light of the evidence before the Court, and were the statements and conclusions by the Court in that Ruling correct.

2. Was justice served, and did the Fourth District Court abuse it's discretion by it's denial of the 60 (b) Motion to Set Aside Judgment(s)?

STANDARD OF REVIEW

"The Utah Court of Appeals accords Conclusions of Law no particular deference, but reviews them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

In reviewing the grant of Summary Judgment by the Trial Court: "we accept the facts and inferences in the light most favorable to the losing party. Because Summary Judgment is granted as a matter of law, we may reconsider the Trial Court's legal conclusions." Winegar v. Froerer Corp., 813 P.2d 104, 107 (1991 (Citation omitted). See also Mountain States Tel. & Tel. Co. v. Garfield County, 811 P.2d 184, 192 (Utah 1991). "In reviewing a grant of Summary Judgment, we view the facts in a light most favorable to the losing party."

After viewing the facts in a light most favorable to the losing party, it is common to affirm a grant of Summary Judgment only if there is no disputed issue of material fact and the moving party is entitled to Judgment as a matter of law. The Utah Court of Appeals grants no deference to the Trial Court's conclusions of law and reviews them for correctness.

STATEMENT OF GROUNDS FOR SEEKING REVIEW OF ISSUES NOT PRESERVED IN TRIAL COURT

Chris & Laurie Swanson ask that The Utah Court of Appeals reverse the decision(s) by the District Court on the grounds that the Court abused it's discretion in not allowing relief under Rule 60 (b) (1) and (b) (7-now-6) of the Utah Rules of Civil Procedure (see Addendum FF.).

DETERMINATIVE RULE

Rule 60 (b) of the Utah Rules of Civil Procedure states in part that relief from Judgment or order may be obtained due to (1) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On Motion and upon such terms as are just, the Court may in the furtherance of justice relieve a party or his legal representative from a final Judgment, order, or proceeding for the following reasons: (1) mistakes, inadvertence, surprise, or excusable neglect, and (7-now-6) any other reason justifying relief from the operation of the Judgment...

The Motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the Judgment, order, or proceeding was entered or taken.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This action arises out of a family business venture formed by Chris Swanson, Laurie Swanson, Beverly Swanson, and Clinton Swanson, who started a sub Chapter-S Corporation, Swanson Enterprises, Inc., filing such on March 9, 1995, (see Addendum J.) for the purpose of opening a restaurant. Each party owned 25% of the Corporation. As the project progressed and became more valuable, greed, personal and ethical business differences, and seemingly insurmountable disputes and problems arose. Although the Plaintiffs and Appellants, Chris & Laurie Swanson, made every attempt to resolve and settle the matter in any reasonable manner, the dynamics of a dysfunctional family made it impossible to reach any agreement. As a result, this legal action was instituted in the Fourth District Court of Utah by Chris & Laurie Swanson on or about May 16, 1996, against Beverly Swanson, Clinton Swanson, and Nikki Shumway as individuals, and Beverly Swanson, Clinton Swanson, and Nikki Shumway all dba Swanson Enterprises; and Swanson Enterprises, Inc., a Utah business. The Complaint, filed on or about May 16, 1996, (see Addendum K.) was for damages, breach of contract, violation of state law, unfair business practices, theft by conversion, indemnification for unauthorized actions, a derivative suit. The Corporate Defendants' Answer and Counterclaim (see Addendum L.) was filed on or about June 12, 1996, by John Valentine. A Counterclaim (see Addendum M.) was filed by Thomas Seiler, attorney for the Individual Defendants, on or about July 9, 1996. A Response to this Counterclaim (see Addendum N.) was filed by Chris & Laurie Swanson's prior attorney, Mark K. Stringer, on July 17, 1996. In late August, 1996, as Chris & Laurie Swanson had been locked out of the business, and had limited income, Chris Swanson moved to Los Angeles, California, in order to seek employment to pay attorney fees; Laurie followed shortly thereafter. During this time, numerous requests for extensions were requested and granted by and to all parties. On August 16, 1996, Mr. Valentine, noted in a letter to Mr. Stringer, (see Addendum O.) that he had delayed answering the first set of interrogatories and requests for production of documents served to Mr. Valentine, attorney for the Corporate Defendant, on May 15, 1996. On November 7, 1996, Mr. Valentine finally produced (see Addendum P.) the delayed answers to interrogatories and reply to requests for production of documents served May 15, 1996, along with a Stipulation (see Addendum Q.) to Mr. Stringer waiving each party's objections and stipulating that Mr. Stringer file the Response to the Corporate Counterclaim within 10 days. It is our understanding that Mr. Stringer did not respond to this Stipulation and Mr. Stringer did not provide a Response to the Corporate Counterclaim. Although we were continually in contact with Mr. Stringer and his office during this period, and were assured that everything was "on track" and all necessary extensions had been granted, a Partial Summary Judgment was entered in favor of the Individual Defendants on or about December 10, 1996, (see Addendum A.) and a Judgment (see Addendum B.) was entered in favor of the Corporate Defendant on or about May 13, 1997. Chris & Laurie Swanson first learned of the Judgment in favor of the Corporate Defendant in June, 1997 from Mr. Stringer; however, he refused to give us a copy of the Judgment and claimed it was "at his other office". He also misrepresented the nature of the Judgment. We only learned about the Partial Summary Judgment upon going directly to the Court in July, 1997. Upon discovery of Mr. Stringer's failure, we immediately terminated him, (see Addendum R.) and filed a 60 (b) Motion to Set Aside the Partial Summary Judgment (see Addendum S.) in favor of the Individual Defendants on July 23, 1997. Chris and Laurie also filed a 60 (b) Motion to Set Aside the Judgment in favor of the Corporate Defendant (see Addendum T.) on July 2, 1996. The Hearing on these Motions was held on September 4, 1997 (see Addendum Y). The Ruling against Chris & Laurie Swanson was filed October 10, 1997 (see Addendum C.). This Ruling was appealed to The Supreme Court of Utah on or about November 25, 1997 (see Addendum D.), and subsequently poured over to The Utah Court of Appeals on May 28, 1998 (see Addendum E.).

SUMMARY OF THE ARGUMENTS

Rule 60 (b), Utah Rules of Civil Procedure, contains several basis for setting aside a Judgment. The Summary Judgment in this case should have been set aside under Rule 60 (b) (1) or 60 (b) (7-now-6).

The circumstances under which these Judgment(s) were taken against Chris & Laurie Swanson warrant the setting aside of the Judgment in furtherance of justice and/or pursuant to Rule 60 (b).

There was sufficient evidence of a meritorious defense against the Counterclaims of the Defendants to warrant setting aside of the Judgments.

The actions of the now suspended (see Addendum U.) and bankrupt (see Addendum V.) attorney Mark K. Stringer, as admitted in his sworn Affidavit (see Addendum W.) which was before the Court, and as outlined in the sworn Affidavits of Chris & Laurie Swanson on July 15, 1997 (see Addendum X.), constituted gross neglect on Stringer's part and misconduct of a nature that Chris & Laurie Swanson were not even nominally represented, and they should be absolved from his conduct in this case. If "the neglect of a party's attorney is of an extreme degree amounting to positive misconduct, the attorney's conduct is considered to obliterate the existence of the attorney-client relationship, and the party will not be charged with responsibility for the misconduct of his attorney". Aldrich v. San Fernando Valley Lumber Co., (1985, 2d Dist) 170 Cal App 3d 725, 216 Cal Rptr 300.

Chris & Laurie Swanson were reasonable and diligent to rely upon the representations of Mark Stringer. "...where the client has acted as a reasonable prudent person in engaging an attorney...has relied on him to protect his rights, and has made reasonable inquiry concerning the proceeding...a court of equity is not bound to impute to a client everything his attorney does or omits to do." Paschong v. Hollenbeck, (1961) 13 Wis 2d 415, 108 NW2d

668.

The District Court failed to allow Chris & Laurie Swanson's subsequent attorney, Jerry Schollian, to fully and fairly argue the issues at hand during the 60 (b) Hearing on September 4, 1997 (see Addendum Y.).

Admittedly, Chris & Laurie Swanson's subsequent attorney, Schollian, should have presented the three Affidavits (see Addendums G., H., I.) before the day of the Hearing.

However, Mr. Schollian was at a severe disadvantage due to Mr. Stringer's refusal to release our legal records, and hampered by his lack of knowledge of the case, due to the abrupt circumstances of Mr. Stringer's termination and the resulting time constraints. The Court referred to these Affidavits as justification for it's Ruling (see Addendum C.) against Chris & Laurie Swanson, yet ignores substantial information contained therein, that strongly rebuts the basis for the original Summary Judgments.

The Court erroneously states that Chris & Laurie Swanson had taken no action at all since May, 1996, and had allowed the matter to languish; however, a Response to the Counterclaim of the Individual Defendants was filed July 17, 1996 (see Addendum N.). Furthermore, evidence not discovered or available to Mr. Schollian or us at the time of the 60 (b) Hearing, shows that the Corporate

Defendant had delayed answering responses to Plaintiff's interrogatories and requests for production of documents filed May 15, 1996, until November 7, 1996 (see Addendum P.). In addition, the attorney for the Individual Defendants delayed filing an Acceptance of Discovery (see Addendum Z.) and Certificate of Delivery (see Addendum AA.), both served in July, 1996, until December 31, 1996.

ARGUMENT I

THE DEFAULT SHOULD BE SET ASIDE UNDER RULE 60(b)(7)

"The provisions of Subsection (b)(7-now-6) are sufficiently broad to permit a Court to set aside an Order, dismissing a Plaintiff's Complaint, which was entered upon an assumption that the Plaintiff was procrastinating and not answering interrogatories submitted to him, and to enter a new Order based upon the record before it that Plaintiff was represented by incompetent counsel and that Defendants were not being unduly prejudiced." Stewart v. Sullivan, 29 Utah 2d 156, 506 P.2d 74 (1973). The actions of Mark K. Stringer go well beyond excusable neglect, mistake, surprise, or inadvertence as outlined under Rule 60 (b) (1). The Partial Summary Judgment in favor of the Individual Defendants was entered December 10, 1996. Yet on or about

June 8, 1997, Mark Stringer told Chris & Laurie Swanson and Chris' Aunt, Carolyn Christen, that the Lis Pendens (see Addendum BB.) was still in place. This was untrue, as it was released by the Partial Summary Judgment of December 10, 1996 (see Addendum A.). This proves that Mr. Stringer had completely abandoned his fiduciary responsibility, and we were effectively without representation. Mr. Stringer either lied to us in order avoid the consequences of his failure to respond in December, 1996, or was so disabled and incompetent that he was unaware of the Judgment. Relief was not available under Rule 60 (b) (1), as the 3 month limit had expired and his failure to act was so extreme and inexcusable that it constituted much more than inadvertence, mistake, or neglect, which if realized and communicated to his clients in a timely manner, could have been addressed under Rule 60 (b) (1). This was clear misconduct, malpractice, and gross negligence. As outlined in his deposition, Mr. Stringer's problems were not confined to this case. Mr. Stringer has since been suspended from the practice of law by the Utah State Bar (see Addendum U.). Mr. Stringer has also declared bankruptcy (see Addendum V.). This was not an isolated incident, but constituted such negligence as having been proved a pattern, resulting in his suspension from the practice of law. Mr. Schollian advised us that Mr. Stringer was under Federal Indictment which, if true, would have a bearing upon his standing and reputation in the legal community and his ability to effectively handle our case. Mr. Schollian also advised us that Judge Hansen recused himself from the case (see Addendum CC.) as a result of his contempt for Mr. Stringer. Mr. Stringer never advised us of Judge Hansen's recusal; however, regardless of the reason for Judge Hansen's recusal, Mr. Stringer had a duty to advise us of this important occurrence. It would have raised sufficient suspicion to warrant inquiry into Mr. Stringer's assertions and statements to us. We ask that the Utah Court of Appeals keep in mind that we were living in Los Angeles, California, at the time of the Partial Summary Judgment and Summary Judgment, yet we maintained continued communication via phone, fax, and mail, which can be proved now that we have finally obtained our legal records from Mr. Stringer. The Honorable Judge Schofield ruled that Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties ,(see Addendum C., Page 2, Footnote 1) applies in this case. However, in Lincoln, "Defendant was provided notice of and adequate opportunity for timely Motion to Set Aside Default Judgment when he was personally served Court's Order in supplemental proceedings seven weeks after entry of Default". Clearly, Chris & Laurie Swanson never had such knowledge or opportunity, especially as related to the Partial Summary Judgment, filed December 10, 1996 (see Addendum A.). Mr. Stringer was immediately terminated (see Addendum R.) and new counsel retained once we became aware of the Summary Judgment. Our actions were timely and reasonable, and relief should have been granted under Rule 60 (b) (7-now-6).

ARGUMENT II

PLAINTIFFS' PLEADINGS SET FORTH SUFFICIENT CLAIMS TO AVOID SUMMARY JUDGMENT, AND WHICH JUSTIFY OPPORTUNITY TO PRESENT THE ENTIRE CASE AT TRIAL.

The Plaintiffs' Complaint (see Addendum K.) and other pleadings on file, present for adjudication, the issues and factual matters concerning theft, fraud, specific performance of contractual obligations, and shareholder derivative actions as outlined in our original Complaint, are a sufficient meritorious defense to the Counterclaims of the Defendants. The spurious allegations outlined in the Corporate Defendants Answer and Counterclaim (see Addendum L.) are effectively the same as those made by the

Individual Defendants (see Addendum M.). Chris & Laurie Swanson's Response to Counterclaim, (see Addendum N.) filed July 17, 1997, outlines our meritorious defense. In our first Affidavit, (see Addendum X.) dated July 15, 1997, (point #10) which was part of the record before the Court on the date of the 60 (b) Hearing, we specifically swear and affirm that "We are confident that the findings of this Court, entered as a result of Mr. Stringer's failure to respond to the Motion for Partial Summary Judgments and the finding of the Court as a result of the Summary Judgment entered on May 13, 1997, can be disproved if we are given the opportunity to present our own facts and evidence." Although the three Affidavits (see Addendums G., H., I.) submitted on the day of the Hearing, and relied upon to some degree by Judge Schofield, more strongly and specifically refute the spurious allegations in the Corporate Counterclaim, the legal threshold of meritorious defense was met by both the Affidavit of June 15, 1997 (see Addendum X.), which was reviewed by the Court prior to the Hearing, and the July 17, 1997 Response to Counterclaim (see Addendum N.), filed by Chris & Laurie Swanson and other pleadings that were part of the record. "Because disposition of a case by Summary Judgment denies the benefit of a trial on the merits, any doubt concerning questions of fact, including evidence and reasonable inferences drawn from the evidence, should be resolved in favor of the party opposing the Motion." Beehive Brick Co. v. Robinson Brick Co., 780 P.2d 827 (Utah Ct. App. 1989).

ARGUMENT III

JUDICIAL POLICY, AND CASE LAW, BOTH SUPPORT VACATING A DEFAULT JUDGMENT OR SUMMARY DISMISSAL WHERE THERE IS REASONABLE JUSTIFICATION OR EXCUSE FOR THE PARTY'S FAILURE TO RESPOND OR PLEAD, AND WHERE TIMELY APPLICATION IS MADE TO SET IT ASIDE

The widely recognized case, Westinghouse Electric Supply v. Paul W. Larsen, Contractor, Inc., 544 P2d 876 (Utah 1975), sets the standard for relief under Rule 60 (b). In that case, the Supreme Court reversed the Trial Court and established higher priority of resolving issues on the merits, stating that:

> "the Courts generally tend to favor granting relief from default Judgments where there is any reasonable excuse, unless it will result in a substantial prejudice or injustice to the adverse party".

By relieving the Plaintiffs of the Judgments and holding a trial on the merits, the Defendants will suffer no injustice. The Defendants have had sole control, opportunity and profits from this endeavor. As a result of these Judgments, the Plaintiffs have lost all ownership in a valuable and potentially lucrative business. Further, the hardship on the Defendants, if any, when compared to the hardship on the Plaintiffs should the Judgment stand, supports the Plaintiffs' Request to Set the Judgment(s) Aside, and to decide the matter on the merits.

Further, the policy of granting relief from Default Judgments was restated in the Helgesen case:

> "Discretion should be exercised in furtherance of justice and should incline towards granting relief in a doubtful case to the end that the party may have a hearing...It is quite uniformly regarded as an abuse of discretion to refuse to vacate a default Judgment where there is reasonable justification or excuse for the Defendant's failure to appear and timely application is made to set it aside."

Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981).

As previously stated, the circumstances surrounding the default of the Plaintiffs in this case amount to "reasonable justification" for relief from the Judgment.

ARGUMENT IV

THE DISTRICT COURT'S CONCLUSIONS WERE INCORRECT, BASED BOTH UPON THE EVIDENCE BEFORE THE COURT, AND EVIDENCE NOT AVAILABLE TO CHRIS & LAURIE, AS A RESULT OF MR. STRINGER'S REFUSAL TO RELEASE OUR LEGAL FILE.

On Page 3 of the District Court's October 10, 1997 Ruling (see Addendum C.), The Honorable Judge Schofield states that "Now the Plaintiffs assert that they were misled by their counsel and they were not neglectful. I disagree." This conclusion is not supported by the evidence before the Court: a) Mark Stringer's sworn and notarized Affidavit of Counsel (see Addendum W.) dated June 8, 1997, states in point #23, that "I never notified my clients, as the matter was not discovered until, late, and the communication from the office to clients was limited to known immediate and emergency matters, and the response to the Order did not require their direct participation." b) Chris & Laurie Swanson's sworn and notarized Affidavit (see Addendum X.) of July 15, 1997, states: "Mr. Stringer never informed us of the Motion for Partial Summary Judgment filed by the Individual Defendants, by and through their attorney of record, Mr. Thomas Seiler, on

November 6, 1996." Point #7 states: "We have been diligent in following up with Mark Stringer and his office by phone and fax." Point #9 states: "We had been assured by Mark Stringer and his office that all necessary extensions to respond to discovery had been granted and no adverse actions had occurred as recently as June 10, 1997. We were never informed by Mr. Stringer or his office that our stock certificates had been voided by this Court's Summary Judgment." In addition, Mr. Valentine had delayed answers to interrogatories and reply to requests for production of documents until November, 1996 (see Addendum P.). Mr. Valentine also sent Mr. Stringer a Stipulation (see Addendum Q.) that the Reply to the Corporate Counterclaim was due within ten days from the date of the Stipulation, (enclosed with his letter of November 7, 1996); therefore, it was evident that the Corporate Defendant also delayed and allowed the matter to languish. The Response to the Corporate Counterclaim was not due until approximately November 17, 1996--not July 5, 1996, as stated in the October 10, 1997 Ruling. The Court also erred when it denied relief from the Partial Summary Judgment of December 10, 1996, when it erroneously stated "Plaintiffs have not demonstrated a meritorious defense". The Court either overlooked the Response to Counterclaim (see Addendum N.), filed on or about July 15, 1996, or erred in finding that this Response did not meet the legal definition of a meritorious defense. A meritorious defense is described to include a "proposed answer (that) contains a defense that is entitled to be tried". Erickson v. Schenkers Int'l. Forwarders, Inc., 882 P.2d 1147 (Utah 1994). We had met that criteria in our filings prior to the Joint Hearing of September 4, 1997.

ARGUMENT V

THE DISTRICT COURT ERRED IN IT'S DECISION, AS IT DID NOT ALLOW THE NEW ATTORNEY FOR CHRIS & LAURIE SWANSON TO PRESENT HIS ARGUMENTS AND BE HEARD BEFORE THE COURT.

Reference is made to the Transcript of the Hearing (see Addendum Y.) of September 4, 1997, and we ask that the Utah Court of Appeals take note of Judge Schofield's comments on Page 7, Line 7, at the very beginning of the Hearing,

Judge Schofield: "Isn't their remedy not in this Court but against Mr. Stringer?"

Page 7, Line 13-16, Our Attorney Schollian: "Perhaps for the issues of their damages arising from him but as far as their equity in this case it is here and they never had the opportunity to --"(CUT OFF BY THE COURT).

Page 7, Line 17-22, The Court: "What do you mean they never had the opportunity. They clearly had the opportunity. Their rights were never taken away from them without them being parties to this lawsuit. They are parties to this lawsuit. They have a claim that their attorney malpracticed, not that the Court entered a Judgment improperly."

Page 7, Line 23, Mr. Schollian: "Well, the Court entered its Judgment on the presumption that the Plaintiffs had procrastinated and not responded to - -"(CUT OFF BY THE COURT). Page 8, Line 1, The Court: "On the record before the Court that is exactly what happened."

Page 8, Line 3, Mr. Schollian: "That isn't what happened according to my clients' Affidavit which is before you. They had made continued - - "(CUT OFF BY THE COURT).

Page 8, Line 6, The Court: "Go ahead and make your Rule 60B arguments."

The above portion of the Transcript clearly shows that The Court did not allow our attorney, Mr. Schollian, to complete or make our arguments, and The Court was not open to hearing our arguments at the time of the Motion to Set Aside.

With all due respect, The Court may have made the correct and only possible decisions in favor of the Individual

Defendants and Corporate Defendants prior to Chris & Laurie Swanson having the knowledge and opportunity to be aware of the Judgments and take corrective actions. However, once the clear and unrefuted evidence, including Mark Stringer's Affidavit and our Affidavits, were presented, it was clearly an abuse of The Court's discretion to deny Chris & Laurie Swanson the opportunity to seek alternate counsel and refute the spurious and unfounded "Findings of Fact and Conclusions of Law."

ARGUMENT VI

THERE IS NO COGNIZABLE EVIDENCE TO SUPPORT OR JUSTIFY THE RESULTS OF THESE SUMMARY JUDGMENTS

The Corporate Defendants, in their Answer and Counterclaim, filed June 12, 1996 (see Addendum L.), state no specific dollar claim for damages. Those damages must be established by an Evidentiary Hearing. Chris & Laurie Swanson did not have the opportunity to refute the vague claims made in both the Counterclaim and Motion for Summary Judgment. The Answer and Counterclaim, filed June 12, 1996, by the Corporate Defendant, states on Page 11, #11: ". . . There is approximately $56,000.00 unaccounted for in corporate funds. . ." Yet the Memorandum in Support of Defendant Swanson Enterprises, Inc.'s Motion for Summary Judgment (see Addendum DD.), filed February 11, 1997, states on page 4, #15: ". . . Altogether, about $30,000 to $56,000 of corporate funds remain unaccounted for." It seems that $26,000 may have been accounted for in the interim. To accuse or imply that Chris & Laurie Swanson misused Corporate funds, yet be unable to offer specific proof or evidence beyond a vague $30,000.00 to $56,000.00 figure, should not be a basis for Summary Judgment. Most importantly, Argument Point I in the Memorandum in Support of Defendant Swanson Enterprises, Inc. Motion for Summary Judgment, filed February 11, 1997, is completely without supporting evidence. There is no claim that the stock was issued fraudulently as in _Flore_ (see Addendum DD., Page 5). The sub Chapter-S filing, which is a matter of record (see Addendum J.) from the beginning of this suit, and undisputed, shows that 2500 shares each were issued to Chris Swanson, Laurie Swanson, Beverly Swanson, and Clinton Swanson. The Corporate Defendant has provided no contract, agreement, or other tangible evidence regarding what, if any, consideration was required in exchange for ownership in the corporation. This property had been in the family of Chris and Beverly Swanson since 1948. Furthermore, there is no evidence indicating that any stock was issued fraudulently. In addition, no claim for specific damages was made and no relative value was placed upon the stock which was lost by Chris & Laurie Swanson as a result of the Summary Judgment. All evidence referred to in the above mentioned Memorandum relies upon "the Shumway Affidavit." By all accounts, Shumway was not a party to the formation, original agreements, understandings, or initial operations of this corporation. There is no relationship shown to justify the draconian sanctions against Chris & Laurie Swanson: total loss of substantial shares in a valuable property and corporation with gross assets near One Million Dollars, versus the untrue Counterclaims alleging only vague and unsubstantiated claims of damages.

The balance of the Summary Judgment falls like a house of cards when the preposterous notion, that any shares owned by Chris & Laurie Swanson are void for lack of consideration, is thoughtfully reviewed.

Special notice should be paid to the statement in the Answer and Counterclaim of the Corporate Defendant (see Addendum L.), filed June 12, 1996, which states on Page 11, point 12: "Upon information and belief, this Defendant alleges that the Plaintiffs _may_ (emphasis added) have even repaid themselves for their capital contribution or their share of the payment on the property contributed as capital to the corporation." However, in the Memorandum in Support of Defendant Swanson Enterprises, Inc.'s Motion for Summary Judgment (see Addendum DD.), filed February 11, 1997, Page 6, the Corporate Defendant states that "There is no record of the Plaintiffs making any capital contributions to the corporation." This is a clear contradiction. No independent evidence of any contract or agreement as outlined in <u>Flore</u> (see Addendum DD., Page 5) is provided, no evidence of any transfer of stock, no proof or evidence that $30,000.00-$56,000.00 was improperly used by Chris & Laurie Swanson is presented. More importantly, there is no correlation between the amounts claimed by the Defendants and the value of the shares lost by Chris & Laurie Swanson. The evidence before the District Court at the 60 (b) Hearing was as summarized in our Affidavit of July 15, 1997 (see Addendum X.): "We never had the opportunity to respond to the allegations set forth in the Affidavits that form the basis of the Summary Judgment. We are confident that these false allegations can be disproved if given the opportunity, and welcome the opportunity to present our own facts and evidence."

CONCLUSION

The evidence before the District Court at the time of the 60(b) Hearing, on September 4, 1997, was clear and convincing that Chris & Laurie Swanson had been misled by their now disgraced, bankrupt, suspended, and indicted attorney Mark K. Stringer. Chris & Laurie Swanson were reasonable under the circumstances to rely upon the representations of Mr. Stringer. However, Stringer's failure to disclose material matters and his actions effectively negated the attorney-client relationship; his failings should not be imputed to us. Chris & Laurie showed due diligence in pursuit of the case and brought the Motion to Set Aside in a timely manner. The Summary Judgment resulted in a substantial loss to Chris & Laurie Swanson and should require a review of the basis and amount of the Judgments, especially when (a) We did not have the opportunity to refute the allegations in the Corporate Counterclaim; (b) The claims of the Corporate Defendant are vague and contradictory in the time between their original Counterclaim and later Motion in Support of Summary Judgment. The District Court erred in it's conclusion that Chris & Laurie Swanson had not presented adequate evidence of a meritorious defense. The totality of facts before the District Court do not support the

Ruling by The Honorable Judge Schofield of October 10, 1997. We respectfully ask The Utah Court of Appeals for the following relief: (a) The Partial Summary Judgment in favor of the Individual Defendants, Beverly Swanson, Clinton Swanson, and Nikki Shumway all dba Swanson Enterprises, Inc., of December 10, 1997, should be reversed. (b) The Summary Judgment entered in favor of the Corporate Defendant, Swanson Enterprises, Inc., on or about May 13, 1997, should be reversed. (c) The Ruling to certify the Judgment(s) as final, granted October 10, 1997, should be reversed. (d) The Findings of Fact and Conclusions of Law (see Addendum DD.), signed May 12, 1997, should be voided. The case should be returned to the Fourth District Court, allowed to go forward with discovery, and Chris & Laurie Swanson should be afforded adequate time to retain competent counsel, and a pre-trial Hearing should be set.

All of the above should be set aside under Rule 60 (b) (1) and (b) (6) because justice demands and the circumstances of the case justify setting them aside.

Dated this 24th day of August, 1998.

Chris Swanson

Chris Swanson
Plaintiff and Appellant PRO SE

Laurie Swanson
Plaintiff and Appellant PRO SE

CERTIFICATE OF MAILING

I hereby certify that correct copies of the foregoing were mailed this 24th day of August, 1998, via first class mail, postage prepaid, addressed as follows:

The Utah Court of Appeals
8 copies, 1 with original signature
Office of the Clerk
450 South State Street
P.O. Box 140230
Salt Lake City, UT 84114-0230

Mr. John Valentine
2 copies
c/o Howard, Lewis & Peterson
120 East 300 North
P.O. Box 1248
Provo, UT 84603

Mr. Thomas W. Seiler
2 copies
Robinson, Seiler & Glazier, LC
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

Laurie Swanson

ADDENDUM

ENT 99445 BK 4142 PG 5
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
1996 Dec 10 1:51 pm FEE 20.00 BY JRD
RECORDED FOR THOMAS W SEILER

1996 Dec 9 1018 am

Thomas W. Seiler, #2910
ROBINSON, SEILER & GLAZIER, LC
Attorneys for Defendants
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266
Telephone: (801) 375-1920

MICROFILMED 2/10/97

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs. BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business, Defendants.	**PARTIAL SUMMARY JUDGMENT** Civil No. 960400307CN Judge: Steven L. Hansen

The Court having reviewed the Motion for Partial Summary Judgment, Memorandum of Points and Authorities in Support of Defendants' Motion for Partial Summary Judgment, and the Affidavit of Beverly Swanson, all submitted by the Defendants Beverly Swanson, Clinton Swanson, and Nikki Shumway, by and through their counsel of

(EXHIBIT "A")

record, Thomas W. Seiler of Robinson, Seiler & Glazier, LC, and good cause appearing therefore, the Court does, hereby, ORDER, ADJUDGE AND DECREE as follows:

1. The Plaintiffs have no claim in and to the real property described in Exhibit "J" to the Plaintiffs' Complaint, and to which the Plaintiffs apparently claim an interest in Count II and County IX of the Plaintiffs' Complaint, which real property is more particularly described as follows:

> Commencing 22.44 feet East and 811.14 feet North 35°22' West along Easterly line of State highway from the Southeast corner of Section 26, Township 6 South, Range 2 East, Salt Lake Base and Meridian; thence North 35°22' West 86 feet along Easterly line of Highway; thence North 34° East 76 feet; thence South 35°22' East 86 feet to center line of West Union Canal; thence South 34° West 76 Feet along the canal to the place of beginning

2. The Notice of Lis Pendens filed by the Plaintiffs in this matter as Entry No. 40379, in Book 3968, at Pages 860 and 861, and describing the property set forth above, is hereby ordered released. The Defendants Beverly Swanson, Clinton Swanson, and Nikki Shumway are hereby authorized to record with the Office of the Utah County Recorder, Utah County, State of Utah, a certified copy of this Partial Summary Judgment, which by this Order, has the effect of releasing the Notice of Lis Pendens described herein.

DATED this 6 day of Dec. Nov~~e~~mber, 1996.

BY THE COURT:

District Judge

ORIGINAL IF IN RED INK

ATE OF UTAH)
) SS
UNTY OF UTAH)

the undersigned, Clerk of the Fourth District Court
Utah County, Utah, do hereby certify that the
nexed and foregoing is a true and full copy of an
ginal document on file in my office as such Clerk.
itness my hand and seal of said Court this 10
y of ______ 19 96
ARMA B. SMITH, Clerk
Deputy

CERTIFICATE OF HAND DELIVERY

I hereby certify that correct copies of the foregoing were hand delivered this 19th day of November, 1996, addressed as follows:

Mark K. Stringer
Blakelock & Stringer
37 East Center,
Second Floor, Front
Provo, UT 84606

John L. Valentine
Howard, Lewis & Petersen
120 East 300 North
Provo, UT 84603

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH
1997 MAY 13 AM 9:35

MICROFILMED 5/14/97

JOHN L. VALENTINE (3310), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

J:\jlv\swanson.jud
Our File No. 23,628

Attorneys for Swanson Enterprises, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs. BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY, individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business, Defendants.	JUDGMENT ✓ Case No. 960400307CN Judge Anthony W. Schofield

The above-captioned matter came regularly before the Court on defendant Swanson Enterprises, Inc.'s Motion for Summary Judgment. The Court having entered its Findings of Fact and Conclusions of Law, now enters judgment in favor of the defendant Swanson Enterprises, Inc. as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Any shares of stock issued, owned or claimed to be owned by the plaintiffs Chris Swanson and Laurie Swanson are void for lack of consideration. Any certificates issued by Swanson Enterprises, Inc. to said plaintiffs shall be recalled and cancelled as void.

2. All claims against the defendant Swanson Enterprises, Inc. by the plaintiffs are dismissed with prejudice for the reasons set forth in the Findings of Fact and Conclusions of Law.

3. The issue of whether to award attorney fees in favor of the defendants and against the plaintiffs is reserved.

DATED this 12th day of ~~April~~ May, 1997.

BY THE COURT

Anthony W. Schofield

ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

NOTICE TO PLAINTIFFS' ATTORNEY AND ATTORNEY FOR THE INDIVIDUAL DEFENDANTS, BEVERLY SWANSON, CLINTON SWANSON, AND NIKKI SHUMWAY

TO: MARK K. STRINGER, ESQ.
THOMAS W. SEILER, ESQ.

You will please take notice that the undersigned, attorney for defendant Swanson Enterprises, Inc., will submit the above and foregoing Judgment to the Honorable Anthony W. Schofield for his signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 24 day of April, 1997.

JOHN L. VALENTINE, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Swanson Enterprises, Inc.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 24 day of April, 1997.

Mark K. Stringer, Esq.
Blakelock & Stringer
37 East Center, 2nd Floor
Provo, UT 84606

Thomas W. Seiler, Esq.
Robinson, Seiler & Glazier, LC
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

Julie Seelis
SECRETARY

FILED 10-10-97
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

CHRIS SWANSON, et al.,	CASE NUMBER: 960400307
Plaintiffs,	DATED: OCTOBER 10, 1997
vs.	**RULING**
BEVERLY SWANSON, et al.,	ANTHONY W. SCHOFIELD, JUDGE
Defendants.	

This case is before the Court on plaintiffs' motion under Rule 60(b) for relief from a judgment entered on December 10, 1996 in favor of the individual defendants and a judgment entered May 10, 1997 in favor of the corporate defendant; and on the motion of the defendant to certify these judgments as final pursuant to Rule 54. Jerry Schollian represented plaintiffs, Thomas W. Seiler represented the individual defendants and John L. Valentine represented the corporate defendant. Having received arguments of counsel on September 4, 1997, I now issue this ruling.

Motion for relief from judgment in favor of individual defendants entered December 10, 1996.

When plaintiffs failed to respond to a motion for partial summary judgment filed by the individual defendants, the Court granted the motion. Now plaintiffs assert that the failing was their attorney's, not theirs.

(EXHIBIT "C")

While plaintiffs assert this motion is brought under Rule 60(b)(7), claiming that their counsel was incompetent, it properly belongs under Rule 60(b)(1) which authorizes relief from a judgment based upon excusable neglect. Plaintiffs claim that their counsel did not provide them meaningful assistance and that any negligence was his, not theirs. This is a claim of excusable neglect which properly should be brought under rule 60(b)(1). Where relief is available under that subsection of Rule 60(b), relief is not available under and the Court will not reach the catch-all of subsection (7).[1]

Because this motion properly falls under Rule 60(b)(1), the motion must have been brought within three months of entry of the judgment. Undeniably it was not. This motion is untimely. Further, there has been no showing that plaintiffs have a meritorious defense to this counterclaim. Because the motion was not brought within three months and because plaintiffs have not demonstrated a meritorious defense, the motion is not well-taken. It is denied.

Motion for relief from judgment in favor of corporate defendant entered May 13, 1997.

The corporate defendant obtained a judgment against plaintiffs, again based upon an unopposed motion for partial summary judgment. In this case, however, the motion was brought within three months of entry and thus is timely. While I find neglect, I struggle to find that it truly is excusable. The counterclaim at issue here

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[1] "Furthermore, subsection (7) may not be employed for relief when the grounds asserted are encompassed within subsection (1)." Lincoln Benefit Life Insurance Co. v. D.T. Southern Properties, 838 P.2d 672, 674 (Utah App. 1992).

was filed on June 12, 1996 and served by mailing on that date. A reply was due not later than July 5, 1996. As of this date no reply to that counterclaim ever has been filed.

When a reply was not forthcoming, the corporate defendant repeatedly asked plaintiffs, through counsel, to file a reply. Then, rather than simply defaulting the plaintiffs, the corporate defendant filed its motion for summary judgment. Still there was no response of any sort by plaintiffs and summary judgment was granted.

Now plaintiffs assert that they were misled by their counsel and that they were not neglectful. I disagree.

This case has been pending since May 10, 1996. Yet since that time, plaintiffs have taken no action to move the case forward. Their last affirmative action in the case was the filing of discovery requests in May 1996. Now they ask the Court for relief so they can prosecute an action which they have allowed to languish.

On the day of hearing plaintiffs filed three additional affidavits. Defendants ask that I ignore these affidavits. I agree that any affidavits filed on the day of hearing, in a circumstance where the other parties have not had any opportunity to even review them before the hearing, should not be considered. Thus this ruling is based upon the record prior to the filing of those three affidavits.

The corporate defendant is entitled to a resolution on its counterclaim. Long ago it was entitled to a reply. Plaintiffs are in default for failure to file a reply. That default was compounded when plaintiffs failed to respond to the motion for summary judgment. I find neglect, but, where over a year passed from the time the reply was due to the time of hearing on this motion, and where plaintiffs have not taken action to ensure that their cause was diligently prosecuted, I cannot find that neglect excusable.[2] Further, I do not find meaningful evidence that plaintiffs have a meritorious defense to the counterclaim. I deny this motion.

Motion to certify the judgments as final pursuant to Rule 54.

Defendants' motion to certify the judgment as final is well taken. I grant this motion.

Pursuant to Rule 4-504, Utah Code of Judicial Administration, Mr. Seiler is directed to prepare an appropriate order.

Dated this 10 day of October, 1997.

BY THE COURT:

Anthony W. Schofield

ANTHONY W. SCHOFIELD, JUDGE

---

[2] I note that the late filed affidavits make clear that plaintiffs claim to have been actively involved and speaking with their prior counsel from April 1996 through September 1996. The reply was due during this time. Yet, plaintiffs have taken no action at all with respect to this action since they first filed this action and served discovery requests in May 1996.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 15 day of October, 1997:

JOHN L VALENTINE ATTY
PO BOX 778
PROVO UT 84603

THOMAS W SEILER ATTY
80 N 100 W
PO BOX 1266
PROVO UT 84603-1266

JERRY SCHOLLIAN ATTY
37 E CENTER ST #208
PROVO UT 84601

CARMA B. SMITH
CLERK OF THE COURT

By Mary Anderson
Deputy Clerk

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

Nov 25 11 52 AM '97

COPY

Jerry Schollian (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF UTAH

CHRIS SWANSON & LAURIE SWANSON	NOTICE OF APPEAL
Plaintiffs/Appellant,	Civil No. 960400397
vs.	
BEVERLY SWANSON, an individual, et al.	
Defendants/Appellees.	

Notice is hereby given that Plaintiffs and Appellants, Chris Swanson and Laurie Swanson, by and through counsel, Mr. Jerry Schollian, appeal to the Utah Supreme Court the final order and judgment of the Honorable Anthony Schofield, entered in this matter on November 10, 1997.

The appeal is taken from the entire order and judgment.

RESPECTFULLY SUBMITTED on this 25th day of November, 1997.

Jerry Schollian
Attorney for Plaintiffs/Appellants

CERTIFICATE OF MAILING

This certifies that the undersigned has mailed a true and accurate copy of the preceding document to the following parties:

Mr. Tom Seiler
80 North 100 West
Provo, UT 84603-1266

(EXHIBIT "D")

Utah Supreme Court
332 State Capital Building
Salt Lake City, UT 84114

DATED this 25th day of November, 1997

SUPREME COURT OF UTAH
OFFICE OF THE CLERK
450 S. STATE
P.O. BOX 140210
SALT LAKE CITY, UTAH 84114-0210

May 28, 1998

order

OFFICE OF THE CLERK

CHRIS SWANSON
823 PALM DR
GLENDALE CA 91202

Chris Swanson and
Laurie Swanson,
Plaintiffs and Appellants,
v.
Beverly Swanson,
an individual, et al.,
Defendants and Appellees.

No. 970578
960400307

Pursuant to the authority vested in this Court, this case is poured-over to the Court of Appeals for disposition. All further pleadings and correspondence should be directed to that Court.

The address is 450 S. State, P.O. Box 140230, Salt Lake City, Utah 84114-0230.

Please direct all questions to the Utah Court of Appeals.

Pat H. Bartholomew
Clerk of Court

(EXHIBIT "E")

FILED
Utah Court of Appeals
JUL 13 1998
Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

----ooOoo----

Chris Swanson and Laurie Swanson,

Plaintiffs and Appellants,

v.

Beverly Swanson, an individual, and Clinton Swanson, an individual, and Nikki Shumway, all dba Swanson Enterprises, and Swanson Enterprises, Inc., a Utah business,

Defendants and Appellees.

ORDER

Case No. 980285-CA

This case is before the court on a sua sponte motion to dismiss the appeal for lack of jurisdiction based upon the docketing statement. Based upon a review of the entire trial court record, the notice of appeal was filed within thirty days after entry of a November 11, 1998 order memorializing the trial court's ruling and certifying the order as final for purposes of appeal under Rule 54(b) of the Utah Rules of Civil Procedure. On the basis of the foregoing,

IT IS HEREBY ORDERED that the sua sponte motion for summary disposition is withdrawn.

Appellant's brief shall be filed on or before August 24, 1998.

Dated this 13th day of July, 1998.

FOR THE COURT:

Pamela T. Greenwood, Judge

(EXHIBIT "F")

CERTIFICATE OF MAILING

I hereby certify that on July 13, 1998, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Chris and Laurie Swanson
823 Palm Dr
Glendale CA 91202

Thomas W. Seiler
Robinson, Seiler & Glazier, LC
80 N 100 W
PO Box 1266
Provo UT 84603-1266

John L. Valentine
Howard, Lewis, & Petersen
120 E 300 N St
PO Box 1248
Provo UT 84603

Dated this July 13, 1998.

By Susan Willis
Deputy Clerk

Case No. 980285-CA

Sept 4, 97

Jerry Schollain, (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiffs

IN THE FOURTH DISTRICT COURT FOR THE STATE OF UTAH
IN THE COUNTY OF UTAH

CHRIS SWANSON & LAURIE SWANSON Plaintiffs,	AFFIDAVIT OF LAURIE SWANSON
vs.	Civil No. 960400307
BEVERLY SWANSON, an individual, et al. Defendants.	Judge Anthony W. Schofield

STATE OF UTAH }
ss.
COUNTY OF UTAH }

Laurie Swanson, being first duly sworn, do hereby deposes and state:

1. I am of the age of majority and do possess the capacity and personal knowledge to attest to the facts stated herein;

2. From April 1996 up through September 1996, I was in regular contact with Mr. Stringer to check on development on the case. During this period of time, I was told by Mr. Stringer and his staff that there was extensive negotiations going on between him, Mr. Valentine and Mr. Seiler.

4. In September 1996, my husband moved to Glendale, California, and I remained in Utah until late November 1996.

5. During the time my was husband was living in California and I was living in Utah, I called Mr. Stringer's office several times. I was told by Mr. Stringer, his wifeLinda and members of his staff that the case would take several months before anything happened. I was told by Mr. Stringer, his wife Linda and members of this staff that he was on top of the case and that he was moving things forward.

6. I was never informed by Mr. Stringer that a motion for partial summary judgment was filed. I was only told that the plaintiffs were attempting to drag the case out as long as

possible.

7. Once I moved to California, my husband and I contacted Mark Stringer by fax and phone on at a regular basis. We were never told of any motion for partial summary judgment or motion for summary judgment.

8. From March 1997 up through April, 1997, My husband and I contacted Mr. Stringer's office on a regular basis to check up on the progress of the case. I was told by Mr. Stringer's office staff on numerous occasions that the case was being moved forward.

9. In April 1997, I contacted the office of Mark Stringer. I had previously heard from members of my husbands family that we had lost the case. I asked Mr Stringer's secretary to specifically ask Mark Stringer if we had lost the case. Mr. Stringer's secretary specifically stated that we had not lost the case and that all was fine.

10. On or about June 10, 1997, I had a conference with Mr. Stringer, my husband, my husband's Aunt and my husband in which he stated to me that the Lis Pendens was still in place and that it had not in fact been released.

11. To the best of my knowledge and information, the above stated facts are true and accurate.

RESPECTFULLY SUBMITTED on this 4th day of September, 1997.

Laurie Swanson
Plaintiff

JERRY SCHOLLIAN
Notary Public
State of Utah
My Commission Expires June 18, 2001
37 E. Center St., Provo, UT 84606

SUBSCRIBED to and sworn before me on this 4th day of September, 1997

PUBLIC NOTARY

Jerry Schollian (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiff

IN THE FOURTH DISTRICT COURT FOR THE STATE OF UTAH
IN THE COUNTY OF UTAH

CHRIS SWANSON & LAURIE SWANSON Plaintiffs, vs. BEVERLY SWANSON, an individual, et al. Defendants	SECOND AFFIDAVIT OF CHRIS SWANSON Civil No. 960400307 Judge Anthony W. Schofield

STATE OF UTAH }
ss.
COUNTY OF UTAH }

Chris Swanson, being first duly sworn, do hereby deposes and states:

1. I am of the age of majority and do possess the capacity and personal knowledge to attest to the facts stated herein;

2. The following statements are my responses to the affidavit of Nikki Shumway, filed in support of the individual defendant's motion for summary judgment. I was not aware of the affidavit of Nikki Shumway until around June 27, 1997, when my wife, Laurie Swanson, discovered the affidavit and motion for summary judgment in the Court's file.

3. In response to Ms. Shumway's statements in paragraph 1 of the affidavit, I do not believe that Ms. Shumway has sufficient personal knowledge to many of the facts she has stated in her affidavit. Ms. Shumway became a shareholder in Swanson Enterprises, Inc. only after the corporation's stock was redistributed for the benefit of SBA financing.

4. In response to Ms. Shumway's statements in paragraph 2 of the affidavit, all allegations of fact therein are true to the best of my knowledge and information;

5. In response to Ms. Shumway's statements in paragraph 3 of the affidavit, the scope of the remodeling project changed continually through the development of the project; however, the concept of the restaurant was constantly being developed during the remodeling

project, and many changes to the existing structure were necessary. All other allegations of fact therein are true to the best of my knowledge and information.

6. In response to Ms. Shumway's statements in paragraph 4 of the affidavit, I and my wife gave up well paying jobs with excellent benefits, our house, and security to devote the necessary time and effort to complete the project. My wife and I contributed our own experience and skills for no money, until the restaurant business began to operate. My wife and I worked on the project full-time with no reimbursement for our out of pocket expenses, and the use of our apartment as the corporate office. The capital contributions by Beverly Swanson were in the from of land she conveyed to the corporation;

Furthermore, my own interest in the real property was conveyed to the corporation because the city of Orem required that the property be all under one deed before any improvements could be approved. A deed reconveying my interest in the real property was conveyed to me to secure my interest in the real property. The deed was not recorded because by doing so, the city of Orem would not issue a permit for further improvements. I trusted my family members to look out for my best interests. I contributed my experience and expertise to the Corporation by assisting in the design of the kitchen and operating the business;

7. In response to Ms. Shumway's statements in paragraph 5 of the affidavit, the officers as outlined therein are correct to the best of my own knowledge and information; however, due to the extended time required to finish construction, the agreements regarding compensation were changed;

8. In response to Ms. Shumway's statements in paragraph 6 of the affidavit, it was not necessary to construct a new building. Upon the insistence of Beverly Swanson, a new building was constructed. Beverly Swanson did not contribute any more additional capital, only additional equity in the real property.

Nikki Shumway was not initially included as a stockholder. Ms. Shumway was given a probationary period to see if her inclusion in the operation of the business would be possible. The success of the probation was contingent upon her ability to work with me, who was the creator and facilitator of the project. Ms. Shumway's inclusion as a shareholder and participation in the management of the restaurant was subject to approval by myself and my wife. The inclusion of Ms. Shumway in the business was only considered after she left her position at Jakes Restaurant, in Draper, Utah.

9. In response to Ms. Shumway's statements in paragraph 6 of the affidavit, the restructuring of the corporate ownership was done in order to qualify for the SBA financing. The restructuring of the corporate shares of stack was contingent upon a private agreement between myself and Beverly Swanson to write a will to transfer her shares to me upon her death, in order to insure my position as a majority stock holder. I was also to receive options to repurchase shares back up to my original 25% at a nominal fee, ($1.00 per share). I did prepare the SBA loan documents; however, the SBA loan was contingent upon a viable, equipped, capitalized business as presented in the business plan.

10. In response to Ms. Shumway's statements in paragraph 7 of the affidavit, the changes i n ownership of the Corporate Shares were not made until the plaintiff initiated this lawsuit. As indicated by Ms. Shumway, I was responsible for the day to day operations of the business, including dong business with the City, obtaining permits, working with subcontractors,

consultants, purchases and negotiations. Managing the accounts payable and other bookkeeping matters required significant amounts of my wife's time. Beverly Swanson was informed of the reimbursements to my wife for her time, which only amounted to $1,600 for sixteen (16) weeks of work.

11. In response to Ms. Shumway's statements in paragraph 9 of the affidavit, Laurie was familiar with the bookkeeping system purchased by the Corporation. All prior records had been kept on an Apple Macintosh and a Quick Books program. The platform to transfer the Apple data to an IBM format was simply unavailable. Upon information and belief, the bookkeeping data entered by Ms. Shumway was inaccurate and self-serving.

12. In response to Ms. Shumway's statements in paragraph 10 ~~of the~~ affidavit, All disbursement of Corporate funds were fully authorized and documented. All records of disbursements of Corporate Funds have been given to the Corporate and Individual Defendants. Upon information and belief, the Defendants have misplaced and misrepresented the Corporate Disbursements.

13. In response to Ms. Shumway's statements in paragraph 11 of the affidavit, The allegations of fact therein are false. All disbursements are fully documented and no funds were misappropriated for my use of the use of my wife. any checks for our personal use were repayments of loans made to the corporation or of our personal funds.

14. In response to Ms. Shumway's statements in paragraph 12 of the affidavit, the allegations of fact therein are false. I have Video tape of myself being physically thrown out of the restaurant by Nikki Shumway. I do not have a key to the restaurant and the employees have been instructed to keep me out.

15. In response to Ms. Shumway's statements in paragraph 13 of the affidavit, all allegations of fact therein are false. All account and loan records were turned over to the defendants. No corporate funds were transferred to our personal use and all funds can be accounted for. Many of the equipment and expenses were paid in cash. Clinton Swanson, Beverly Swanson and Nikki Shumway have all asked for case on numerous occasions and no receipts were ever supplied. Clinton Swanson was the contractor of record and ultimate was responsible for employee payments, taxes, workman's compensation, etc. Any cash funds released were done at his specific instructions.

16. In response to Ms. Shumway's statements in paragraph 14 of the affidavit, all allegations stated therein are false. Any funds deposited from my account to the Corporation were loans to the Corporation

17. In response to Ms. Shumway's statement's in paragraph 15 of the affidavit, all allegations of fact therein are false. A corporate kit was purchased from Utah Office Supply on Center Street in Provo prior to the formation of the Corporation. The only legitimate stock certificates issued by the corporation were the certificates issued upon the formation of the corporation and are documented on the Corporation's application for S Corporation status to the IRS. See Exhibit A, 2553 application for S Corp.

18. In response to Ms. Shumway's statements in paragraph 16 of the affidavit, plaintiff have no information to form any opinion as to these allegations, and therefore deny the same. Defendants have always refused to provide any profit/loss statements or tax returns of

the Corporation.

19. In response to Ms. Shumway's statements in paragraph 17 of the affidavit, some my property and my wife's property was stolen; however, any claims of stolen property against Nikki Shumway are irrelevant to this matter.

20. In response to Ms. Shumway's statements in paragraph 18 of the affidavit, I do not have enough information to form any believe as to such allegations, and therefore deny the same.

21. In response to Ms. Shumway's statements in paragraph 19 of the affidavit, there was never any intention on my part ~~to wrongfully~~ report any facts to any agency of the state or city. It is only my intent to prevent the defendant's from continuing to engage in unauthorized, ultra varus acts.

RESPECTFULLY SUBMITTED on this 4TH day of September, 1997.

Chris Swanson
Chris Swanson
Plaintiff

SUBSCRIBED to and sworn before me on this ___ day of September, 1997

JERRY SCHOLLIAN
Notary Public
State of Utah
My Commission Expires June 18, 2001
37 E. Center St., Provo, UT 84606

Notary Public

(Rev. December 1990)
Department of the Treasury
Internal Revenue Service

ion by a Small Business Corporation

Under section 1362 of the Internal Revenue
▶ **For Paperwork Reduction Act Notice, see page 1 of instructions.**
▶ **See separate instructions.**

OMB No. 1545-0146
Expires 11-30-93

Notes: 1. *This election, to be treated as an "S corporation," can be accepted only if all the tests in General Instruction B are met; all signatures in Parts I and III are originals (no photocopies); and the exact name and address of the corporation and other required form information are provided.*

2. *Do not file Form 1120S until you are notified that your election is accepted. See General Instruction E.*

Part I Election Information

Please Type or Print

Name of corporation (see instructions) Swanson Enterprises, Inc.	**A Employer identification number** (see instructions) 87 - 0537041
Number, street, and room or suite no. (If a P.O. box, see instructions.) 2001 S. State Street, #2	**B** Name and telephone number (including area code) of corporate officer or legal representative who may be called for information Chris Swanson (801) 226-875
City or town, state, and ZIP code Orem, UT 84058	**C** Election is to be effective for tax year beginning (month, day, year) 1-1-95

D Is the corporation the outgrowth or continuation of any form of predecessor? . . ☐ Yes ☒ No
If "Yes," state name of predecessor, type of organization, and period of its existence ▶ ....

E Date of incorporation
3-9-95

F Check here ▶ ☐ if the corporation has changed its name or address since applying for the employer identification number shown in item A above.

G State of incorporation
UT

H If this election takes effect for the first tax year the corporation exists, enter month, day, and year of the **earliest** of the following: (1) date the corporation first had shareholders, (2) date the corporation first had assets, or (3) date the corporation began doing business. ▶ 3-9-95

I Selected tax year: Annual return will be filed for tax year ending (month and day) ▶ December 31
If the tax year ends on any date other than December 31, except for an automatic 52-53-week tax year ending with reference to the month of December, you **must** complete Part II on the back. If the date you enter is the ending date of an automatic 52-53-week tax year, write "52-53-week year" to the right of the date. See Temporary Regulations section 1.441-2T(e)(3).

J Name of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety. (A husband and wife (and their estates) are counted as one shareholder in determining the number of shareholders without regard to the manner in which the stock is owned.)	K Shareholders' Consent Statement. We, the undersigned shareholders, consent to the corporation's election to be treated as an "S corporation" under section 1362(a). (Shareholders sign and date below.)*		L Stock owned		M Social security number or employer identification number (see instructions)	N Shareholder's tax year ends (month and day)
	Signature	Date	Number of shares	Dates acquired		
Beverly G. Swanson	Beverly G. Swanson	3/9/95	2500	3/9/95	529-44-3480	12/31
Chris Swanson	Chris Swanson	3/9/95	2500	3/9/95	528-90-5547	12/31
Clinton E. Swanson	Clinton E. Swanson	3/9/95	2500	3/9/95	528-44-3408	12/31
Laurie C. Shepard-Swanson		3/9/95	2500	3/9/95	565-13-5417	12/31

RECEIVED
MAR 1 0 1995
DIRECTOR
SALT LAKE CITY, UTAH
TAXPAYER SERVICE

*For this election to be valid, the consent of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety must either appear above or be attached to this form. (See instructions for Column K if continuation sheet or a separate consent statement is needed.)

Under penalties of perjury, I declare that I have examined this election, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature of officer ▶ Chris Swanson **Title** ▶ President **Date** ▶ 3/9/95

See Parts II and III on back.

Form **2553** (Rev. 12-90)

Jerry Schollian (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiff

IN THE FOURTH DISTRICT COURT FOR THE STATE OF UTAH
IN THE COUNTY OF UTAH

CHRIS SWANSON & LAURIE SWANSON Plaintiffs,	THIRD AFFIDAVIT OF CHRIS SWANSON
	Civil No. 960400307
vs.	Judge Anthony W. Schofield
BEVERLY SWANSON, an individual, et al. Defendants.	

STATE OF UTAH }
ss.
COUNTY OF UTAH }

Chris Swanson, being first duly sworn, do hereby deposes and states:

1. I am of the age of majority and do possess the capacity and personal knowledge to attest to the facts stated herein;

2. The following statements are my responses to the affidavit of Beverly Swanson, (hereinafter "affidavit"), filed in support of the defendant's motion for partial summary judgment. ;

3. In response to Ms. Swanson's statements in paragraph 1 of the affidavit, to the best of my knowledge and information they are true.

4. In response to Ms. Swanson's statements in paragraph 2 of the affidavit, all allegations of fact therein are true to the best of my knowledge and information;

5. In response to Ms. Swanson's statements in paragraph 3 of the affidavit, the fact stated therein are true to the best of my knowledge and information; however, it is important to note that Ms. Swanson had tried for years to purchase the real property from her brother Ray Christen. I was able to negotiate the purchase the real property.

6. In response to Ms. Swanson's statements in paragraph 4 of the affidavit, I do not have enough information to confirm the statements of fact made therein;

24

(EXHIBIT "T")

7. In response to Ms. Swanson's statements in paragraph 5 of the affidavit, I conveyed my interest in the real property only because it was required by the city of Orem that the property be held in one deed in order to obtain a building permit. I was given no consideration for my interest in the real property. Ms. Swanson gave me a deed to the real property to secure my interest therein; however, the deed was never recorded.

8. In response to Ms. Swanson's statements in paragraph 6 of the affidavit, My release of my own interest in the real property was only to facilitate in the obtaining of a building permit from the city of Orem. It was not my intention to simply give away my interest in the real property.

9. In response to Ms. Swanson's statements in paragraph 7 of the affidavit, Ms. Swanson is an experienced business woman. Ms. Swanson's assertion that she did not know what she was doing is completely false. The document was in quid pro quo for my release of ownership in the property in order to obtain the necessary building permits. The retransfer was to secure my position in case anything went wrong.

10. In response to Ms. Swanson's statements in paragraph 8 of the affidavit, all statements of facts stated therein are false.

11. In response to Ms. Swanson's statements in paragraph 9 of the affidavit, I had no part in the preparation or execution of documents transferring ownership of my share of the property purchased from Ray Christen to Swanson Enterprises.

12. In response tò Ms. Swanson's statements in paragraph 10 of the affidavit, this was an act of fraud. Beverly Swanson was fully aware that ownership of the property purchased from Ray Chirstensen had been signed back to me and Beverly Swanson as joint tenants.

13. Beverly Swanson is well aware of my efforts and hard work in the Resturant Roy. <u>See</u> Letter written

RESPECTFULLY SUBMITTED on this 4TH day of September, 1997.

Chris Swanson
Plaintiff

SUBSCRIBED to and sworn before me on this ___ day of September, 1997.

Public Notary

CERTIFICATE OF MAILING

This certifies that the undersigned has mailed a true and accurate copy of the preceding document to the following parties:

Original to:

Fourth District Court
Attention Civil Clerk
125 North 100 West
Provo, UT 84603

Copy to:

Mr. John Valentine
c/o Howard, Lewis & Peterson
120 East 300 North
P.O. Box 1248
Provo, UT 84603

Mr. Tom Seiler
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

DATED this 4th day of September, 1997.

old, and I work like a dog because I have too.

Shag works from 6:30 until after dark seven days a week, he is wearing out.

We are under the gun to get this project done and it is costing so much more money than we anticipated because we kept making changes.

If Chris did not work with the city constantly, trying to get the roofer's etc on the job, we would never have been able to do this project.

He has literally worked miracles to get some of the things passed off with the city.

He is on the phone or at the city constantly or going to the engineer and hundreds of other projects to get this place done.

He quit a wonderful job where his Christmas bonus would be 20 to 30 thousand each Christmas.

Gave up a beautiful condo to come here and help with this venture, lives in a tiny apartment with absolutely no privacy, someone is always in there having a meeting with the roofers or the workers [illegible]

12-6-95

Dear Shane

I thought if I wrote to you I would be able to talk to you.

I want you to know we love you and your family very much.

I realize I'm not the mother or grand mother you want.

My life is very busy because I need money.

Shag had to quit work so he can build the restaurant, so I'm sole support of the two of us.

If you think I love to work during the day & then come home & pick up five suitcases that weigh over 50 lbs that I drag up and down stairs, set the display up, try to convince people they need my product, then after dealing with the wonderful public, pack everything up and drag them to my car, with my back aching so badly I can hardly make it to the car, you're mistaken, I do it because I have to.

I work many weekends either with a showing or a meeting with my girls.

If I ever have a chance to not work, I don't feel like doing anything but resting.

I'm very tired, I'm nearly 60 years

III

need to be made almost constantly
the project is so much bigger than
we could ever have imagined
If we would have known how hard
this project would have been we would
have done it
But it's too late now to do anything
but work our guts out and get it done
I won't bore you with all of the detai
but you couldn't possibly imagine what
we have gone thru
When you see Chris, Nikki and myself
in the car it's because we've been over to
Ernst or one of the hardware store trying
to pick out the right sinks etc etc
we are not on a joy venture, we are try
to get everyone to agree on what to use
and it's not been easy.
If we don't put everything we all
have into this project, I could lose my
inheritance, the property my dad work
so hard for and loved so much
This place is a tribute to my dad
and it will be spectacular
But anything worth having is worth
working for.

of the extras that we didn't know would come up, like $16,000 for a sewer the city is making us put in, we think by digging by hand and doing it ourselves we can do it for $10,000

This is just one of many dozens of things the city has made us do, that wasn't in the budget.

I had to write a check on the 30th of November for $2,650.00 for taxes on the property and it goes on and on + on.

This is an extremely stressful situation I love Colby very much but I don't have the strength or energy to tend him I'm tired.

I know you understand what it is to go into business for yourself, its very hard.

What you said in front of him, will effect him the rest of his life.

Things like that will effect his self image, it will be deep seated and he's the one that later in life will have hang up, that will hurt him.

I didn't used to know how things like that effect children, but thru many years of listening I have learned that the child will be very much effected by hearing what you said [illegible]

V

Maybe you feel like you & Leanne would like to take off on a weekend & leave Colby with us because we have nothing else to do, ~~I'm~~ sure you would like that but, we are not home enjoying ourselves, we very seldom have a day we can rest.

I'm sorry the situation is like it is, but these are the facts.

I will never be the kind of mother or grandmother you want, I'm sorry but I'm not up to it

It doesn't mean I love Ashley any more that I love Colby, it just mean's the situation is different now.

So if you want to write us off that's your choice, I'm sad if you choose to take that route, but I can understand how left out you must feel & I'm very sorry for that, because I see how badly I have failed you.

I'm sorry and we love you very much but the ball is in your court, You will have to decide if we are completley worthless or not.

And we do very much appreciate the welding & toilet you have helped us with

VI

knows a lot about them after the business is set up but he doesn't know how to set it up.

We are paying $95.00 an hour to have someone help us set up our business on computer.

Chris didn't realize what you really needed, and when he did he realized he didn't know how to do it.

So I'm sorry about that

I know I've let you down and I'm sorry about that but that's the situation

We love you very much & would love to have you a part of the family

Form **2553**
(Rev. December 1990)
Department of the Treasury
Internal Revenue Service

Election by a Small Business Corporation

(Under section 1362 of the Internal Revenue Code)

▶ **For Paperwork Reduction Act Notice, see page 1 of instructions.**

▶ **See separate instructions.**

OMB No. 1545-0146
Expires 11-30-93

Notes: 1. *This election, to be treated as an "S corporation," can be accepted only if all the tests in General Instruction B are met; all signatures in Parts I and III are originals (no photocopies); and the exact name and address of the corporation and other required form information are provided.*

2. *Do not file Form 1120S until you are notified that your election is accepted. See General Instruction E.*

Part I Election Information

Please Type or Print

Name of corporation (see instructions): Swanson Enterprises, Inc.

Number, street, and room or suite no. (If a P.O. box, see instructions.): 2001 S. State Street, #2

City or town, state, and ZIP code: Orem, UT 84058

A Employer identification number (see instructions): 87 - 0537041

B Name and telephone number (including area code) of corporate officer or legal representative who may be called for information: Chris Swanson (801) 226-87

C Election is to be effective for tax year beginning (month, day, year: 1-1-95

D Is the corporation the outgrowth or continuation of any form of predecessor? . . ☐ Yes ☑ No
If "Yes," state name of predecessor, type of organization, and period of its existence ▶ ....

E Date of incorporation: 3-9-95

F Check here ▶ ☐ if the corporation has changed its name or address since applying for the employer identification number shown in item A above.

G State of incorporation: UT

H If this election takes effect for the first tax year the corporation exists, enter month, day, and year of the **earliest** of the following: (1) date the corporation first had shareholders, (2) date the corporation first had assets, or (3) date the corporation began doing business. ▶ 3-9-95

I Selected tax year: Annual return will be filed for tax year ending (month and day) ▶ December 31
If the tax year ends on any date other than December 31, except for an automatic 52-53-week tax year ending with reference to the month of December, you **must** complete Part II on the back. If the date you enter is the ending date of an automatic 52-53-week tax year, write "52-53-week year" to the right of the date. See Temporary Regulations section 1.441-2T(e)(3).

J Name of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety. (A husband and wife (and their estates) are counted as one shareholder in determining the number of shareholders without regard to the manner in which the stock is owned.)	**K** Shareholders' Consent Statement. We, the undersigned shareholders, consent to the corporation's election to be treated as an "S corporation" under section 1362(a). (Shareholders sign and date below.)*		**L** Stock owned		**M** Social security number or employer identification number (see instructions)	**N** Shareholder's tax year ends (month and day)
	Signature	Date	Number of shares	Dates acquired		
Beverly G. Swanson	Beverly G. Swanson	3/9/95	2500	3/9/95	529-44-3480	12/3
Chris Swanson	Chris Swanson	3/9/95	2500	3/9/95	528-90-5547	12/3
Clinton E. Swanson	Clinton E. Swanson	3/9/95	2500	3/9/95	528-44-3408	12/3
Laurie C. Shepard-Swanson		3/9/95	2500	3/9/95	565-13-5417	12/3

RECEIVED
MAR 10 1995
DIRECTOR INT. RE[illegible]
SALT LAKE CITY, UTAH
TAXPAYER SERVICE

***For this election to be valid, the consent of each shareholder, person having a community property interest in the corporation's stock, and each tenant in common, joint tenant, and tenant by the entirety must either appear above or be attached to this form. (See instructions for Column K if continuation sheet or a separate consent statement is needed.)**

Under penalties of perjury, I declare that I have examined this election, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

Signature of officer ▶ Chris Swanson **Title** ▶ President **Date** ▶ 3/9/95

Mark K. Stringer, #4418
BLAKELOCK & STRINGER, P.A.
Attorneys for Plaintiffs
37 East Center
Second Floor, Front
Provo, Utah 84606
Telephone: 375-7678

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs BEVERLY SWANSON, an individual, and CLINTON SWANSON, an individual, and NIKKI SHUMWAY, an individual; and BEVERLY SWANSON, CLINTON SWANSON, and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC. a Utah business Defendants.	COMPLAINT FOR DAMAGES: BREACH OF CONTRACT, VIOLATION OF STATE LAW, UNFAIR BUSINESS PRACTICES, THEFT BY CONVERSION, INDEMNIFICATION FOR UNAUTHORIZED ACTIONS, DERIVATIVE SUIT CIVIL NO. 960400307

COME NOW the Plaintiffs in the above entitled matter, by and through counsel of record, and as and for a Complaint against the Defendants, separately and as joint agents, allege, demand, assert, and complain as follows:

JURISDICTION, PARTIES, VENUE

1. The Plaintiffs are and at all times complained of have been actual or intended residents of Utah County, State of Utah.

2. The individual Defendants are or were at all times complained of residents of and/or doing business in Utah County, state of Utah.

3. The Agreements and Contracts which form the basis of the business relationships at issue, were entered into or performed in part, or were to be performed in whole or in substantial part in Utah County, State of Utah.

4. The acts complained of by the Plaintiffs took place, wholly or in substantial part in the County of Utah, State of Utah.

5. The damages in this matter will exceed $100,000.00.

6. The parties were or are the shareholders, officers, directors and agents for the business known as Swanson Enterprises, Inc.

7. The individual or corporate Defendants will be referred to by their separate names where individual or specific action or liability is plead, and will be referred to generally as "Defendants" where joint action or liability is plead.

8. For the most part, and for purposes of liability and damages, the Defendant persons were acting as the agents for eachother in all matters.

9. The acts complained of include theft of business opportunity, breach of contract, violations of state laws, fraud and deception, all by the Defendants acting in concert to circumvent the Plaintiffs, to divert business opportunity from the Plaintiffs to the Defendants, to breach the agreements of good faith and fair dealing between the Plaintiffs and the Defendants, by fraud, theft and deceit.

10. The Plaintiffs have been damaged, and therefore claim the right to recover from the Defendants, jointly and severally, in an amount not less than $100,000.00 for the lost opportunity, the value of the shares at 50% equity, and in an amount of not less than $100,000.00 in punitive damages, and in an amount not less than $5,000.00 for legal fees and costs incurred, the exact amounts to be proven at the time of trial.

COUNT I:

BREACH OF CONTRACT / CONSPIRACY

11. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 10, as if fully set forth hereat.

12. In or about the 9th day of March, 1995, the individual persons Plaintiffs and Defendants, agreed to form a business venture registered with the state of Utah as SWANSON ENTERPRISES, INC. See Exhibit A Articles, and see also Exhibit B 10 March, 1995 Minutes, incorporated hereat by this reference.

13. Under the terms of the agreement for the said venture, the two Plaintiffs were equal share holders of the business, holding 2500 shares each, representing a total of 50% of the business. Likewise, the two individual defendants, Clinton and Beverly Swanson were equal share holders of the business, holding 2500 shares each, representing a total of 50% of the business.
See Exhibit C Form 2553 Small Business Election, incorporated hereat by this reference.

14. Under the terms of the agreement for the said venture, the Plaintiff Chris Swanson was the President and a Director, and the Plaintiff Laurie Swanson was the Secretary of the said business. See Exhibit D First Annual Report filed 3-14-95, incorporated hereat by this reference. See also Exhibit E.

15. Under the terms of the agreement for the said venture, the parties through the business entity were to own and operate a restaurant at 2005 S. State, Orem, Utah, under the dba THE RESTAURANT ROY. See Exhibit E, DBA Filing 190579, incorporated hereat by this reference.

16. Shortly after formation of the business venture, and as part of the venture, the parties applied for an SBA Loan (No. CDC-863,014,3007) for the financing of the business venture and the development of the land. See Exhibit F, SBA Loan Authorization and 504 Guaranty, incorporated hereat by this reference.

17. In discussing the SBA requirements, it was discovered that having the Plaintiffs remain as 50% shareholders was detrimental to (and possibly fatal to) the SBA funding.

18. Accordingly, the parties discussed informally as shareholders and Board, and agreed in principle that the Plaintiffs would allow an informal restructuring of the shares of the corporation, for purposes of facilitating the SBA loan, with the express understanding that the Plaintiffs would be able to repurchase the shares back up to the 50% level, for a nominal/token payment only.

19. On the basis of this informal understanding and relying on the promises and agreements of the Defendants, the Plaintiffs

allowed the informal proposed restructuring of shares to be filed with the SBA as part of the loan package. See Exhibit F.

20. The SBA rejected the informal arrangement for the shares, and requested that the company formalize the restructuring of the shares, provide new certificates, and draft and pass formal minutes of appropriate meetings -- all of which was never accomplished.

21. Under the terms of the agreement for the said venture, and as an explicit condition of his coming to Utah to participate in the acquisition of the land and the organization of the restaurant, the Plaintiff Chris Swanson was to be the sole day-to-day management of the restaurant, and to receive a regular full time salaried position therefore.

22. In reliance upon the agreements between the parties, and in furtherance of the venture, the Plaintiffs gave up their home, terminated their employment, and moved to Utah, at a cost to them in excess of $7,500 per month.

23. In spite of, and in breach of the agreement reached between the parties, the Defendants have refused to allow the Plaintiffs further access to the property, have denied access to the records of the corporation, and have refused to disclose the day-to-day operations of the proposed restaurant.

24. The Defendants have refused to honor the original agreement to provide the Plaintiff Chris with full time employment as management of the restaurant.

25. As a result of the breach of the agreement by the Defendants, the Plaintiffs have been damaged in an amount not less than $100,000, the exact amount to be proven at trial.

26. As a result of the actions of the Defendants, the Plaintiffs have had to retain counsel for this suit, and demand the recovery of fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNT II:

BREACH OF FIDUCIARY DUTY AND VIOLATION OF STATE LAW AND CORPORATE REGULATIONS

27. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 26, as if fully set forth hereat.

28. The Plaintiff is informed by the Utah State department of Business Regulation, Division of Corporations, and therefore believes that the Defendant persons, acting in and violating their (UCA 22-1-1 et seq fiduciary) capacities as officers, directors or shareholders, have unilaterally amended the corporate structure, changing officers, directors, registered agent, and reapportioning shares.

29. The said Defendants have listed with the state of Utah the following officers:

Beverly Swanson, Pres.
Clinton Swanson, V.Pres.
Nikki Shumway, Sec/Tres., and Reg. Agent.

30. Plaintiffs are informed and therefore believe, that the said Defendant persons have misrepresented to third parties the financial structure of the corporation, including the allocation of

shares, for purposes of obtaining financing and building permits, etc.

31. The said changes in the corporate structure were taken by the Defendant persons, acting illegally and in violation of the rights of the Plaintiffs, and in violation of the Utah statutes governing the operation of corporations.

32. The said changes in the corporate structure were taken by the Defendant persons, without Notice or a duly called and held meeting of the shareholders or directors.

33. Plaintiff asserts the right to bring this Cause under URCP 23.1 regarding derivative actions by shareholders for breach of fiduciary duty by officers, directors, and shareholders; and under UCA 16-10a-101 et seq, governing the operation of corporations and the rights and responsibilities of shareholders, officers, and directors.

34. Plaintiffs are informed and therefore believe that the Defendants have conspired to defraud the Court and Geneva Steel, with regard to an interest in a law suit concerning certain pension payments made by Geneva to the Defendant Clinton Swanson. Because this action was taken in conjunction with the establishment and operation of the corporate business, and involved the corporate officers and directors and shareholders, the Plaintiff believe that some liability may attach to the corporate business.

35. As part of the approval for the building of the restaurant, the City of Orem required that the land for the proposed restaurant be held by one entity.

36. At the inception of the venture, one parcel (referred to

hereinafter as parcel 2) was held by Chris Swanson and Beverly Swanson. See Exhibit G hereto, the Warranty Deed from Christen to Swanson dated 30 December, 1994, incorporated hereat by this reference.

37. In or about 30 March, 1995, in reliance on the agreements and understandings, and to facilitate the approvals required from the city, the Plaintiff Chris Swanson signed a Quit Claim Deed in favor of Defendant Beverly Swanson, placing the said property into her name. See Exhibit H hereto, the Quit Claim Deed from Chris Swanson to Beverly Swanson dated 30 March, 1995, incorporated hereat by this reference.

38. In or about 22 September, 1995, to facilitate the interim financing and city approvals, the Defendant Beverly Swanson signed a Warranty Deed in favor of Defendant Swanson Enterprises, Inc., placing the said parcel 2, and the adjacent parcel 1 into the corporate venture. See Exhibit I hereto, the Warranty Deed from Beverly Swanson to the corporation, dated 22 September, 1995, incorporated hereat by this reference.

39. To secure the Plaintiff's position in the land, and to secure their equity position in the corporation, and to secure Plaintiff Chris' position in management, and in consideration for Plaintiff Chris signing the Quit Claim to Beverly, Beverly simultaneously signed a Warranty Deed in favor of Chris, effectively reconveying the said land interest. See Exhibit J, Warranty Deed, incorporated hereat by this reference.

40. The Defendants have managed the construction in such a manner that there exists an encroachment on an adjacent property,

where the Defendants have had constructed sewage lines.

41. Plaintiff asserts that these actions taken by the Defendant persons, were violations of the restrictions and provisions of UCA 76-10-701, et seq, and therefore constitute felony and misdemeanor crimes and grounds for this civil suit.

42. The Plaintiffs affirmatively represent that (with the exception of the land deeds and the sewage problems) they neither consented nor assented to the said actions taken by the other officers, directors and shareholders.

COUNT III

INDEMNIFICATION FOR UNAUTHORIZED ACTIONS

43. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 42, as if fully set forth hereat.

44. Plaintiffs' assert that the Defendants' took the said actions without the knowledge of, and/or in direct contravention of the dissent from, the Plaintiffs.

45. If there arise from the actions by the defendants suits or claims, seeking damages from the Plaintiffs, the Plaintiffs claim the right to recover the same from the Defendants.

COUNT IV

DERIVATIVE ACTION TO REMOVE OFFICER

46. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 45, as if fully set forth

hereat.

47. Plaintiffs assert that the Defendants have established Defendant Nikki Shumway as an officer of the corporation, without a duly constituted meeting of the Board or shareholders.

48. Plaintiffs assert that if there was a valid agreement for the retention of Shumway as an employee of the corporation, it was conditioned upon her complete commitment as a full time position, without conflicts, and conditioned further on her not disclosing to third parties any corporate confidential information or trade secrets.

49. Plaintiffs assert that the said Defendant Shumway has breached her agreement with the corporation, if any, and violated her fiduciary duty to the company and shareholders, by:

a. fraudulently receiving unemployment compensation while employed with the corporation, with the knowledge and assistance of some or all other Defendants, and

b. revealing to third parties confidential information, including without limitation, restaurant theme concept, menu, design, kitchen layout, and operations.

50. The actions of the said Defendant Shumway are damaging to the corporation, but the other (Defendant) officers, directors and shareholders, have refused to terminate Shumway.

51. The Court should order the termination of Shumway forthwith.

COUNT V

CONVERSION OF PERSONAL PROPERTY

52. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 51, as if fully set forth hereat.

53. The defendants are unlawfully holding personal property belonging to the Plaintiffs, and have unlawfully taken some of the property from storage, and converted it to the use and benefit of the corporation, without compensation to the Plaintiffs.

54. Defendant Shumway is holding at her residence, or stored elsewhere, the personal [property of the Plaintiffs, including, without limitation, electronic equipment, audio systems, Christmas decorations, clothing, wedding dress, personal records and documents, with an aggregate value in excess of $15,000.00.

55. Plaintiffs have repeatedly demanded, but the Defendants refused to release the said personal property.

56. Plaintiffs are informed and therefore believe that the Defendants have begun to convert this property to the benefit of the corporation, specifically taking and installing a $5,000 chandelier and a $2,500 alarm system in the restaurant property, without compensation to the Plaintiffs.

57. Plaintiffs claim the right to recover the amount of $7,000 for the two converted property items, and the right to recover the balance of the personal property itself; only in the alternative that the personal property is no longer available or so damaged as to be effectively destroyed or worthless, the Plaintiffs should recover an amount not less than $15,000 as the reasonable value of

the undelivered property.

58. If the said property is recovered and delivered to the Plaintiffs, the Defendants should be liable to the Plaintiffs for the damage or waste resulting from improper use or storage.

COUNT VI

URCP 66
RECEIVERSHIP OR INDEPENDENT MANAGEMENT

59. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 58, as if fully set forth hereat.

60. The Plaintiffs were at first in charge of the day-to-day operations and books, and were later coerced and forced under duress to acquiesce to the demands of the defendants to turn over control to them.

61. Since the Defendants have taken control, the Plaintiffs have discovered evidence of records alteration and tampering, and are afraid of additional records tampering.

62 The Plaintiffs pray for the Court to install at the Defendants' sole expense, a receiver or independent business manager, to take interim control of the corporate assets and the operations of the restaurant business, during the pendency of these matters.

63 The nature of the operation of a retail business is such that unrestricted operation would allow the Defendants the opportunity to siphon off assets and income, and tamper with or alter the records, to the detriment of the corporation and the Plaintiffs.

64. In this regard, the Receiver should be appointed to review the books and records of the corporation and all accounts, since it's inception.

COUNT VII:

COMMON LAW CONSPIRACY / FRAUD -- PUNITIVE DAMAGES

65. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 64, as if fully set forth hereat.

66. Plaintiffs assert that when the Defendants acted in concert to unfairly profit from and abuse the corporate assets and opportunities, in a manner to restrict and interfere with the Plaintiffs existing rights, it was a common law conspiracy.

67. As a result of the Defendants' actions in conspiring to interfere with and unfairly trade on the Plaintiffs' business interests and rights, the Plaintiffs have been damaged, as set forth herein above, and as more fully proven at the time of trial.

68. Additionally, because of the intentional acts of the Defendants, the Plaintiffs are entitled to recover punitive damages in an amount three times actual damages, but not less than $100,000.00.

COUNT VIII:

PERMANENT INJUNCTION -- RECOVERY OF PROFITS

69. Plaintiffs incorporate by this reference the allegations

of the foregoing paragraphs 1 through 68, as if fully set forth hereat.

70. Plaintiffs are entitled to immediate and permanent injunction against the Defendants, and each of them jointly and severally, restraining each of them, and all acting with or for any of them, from:

a. restricting the Plaintiffs access to the property.

b. restricting the Plaintiffs access to the books and records of the corporation.

c. the transfer, encumbering, or otherwise diminishing in value of any corporate assets or opportunities.

71. Plaintiffs are entitled to an Order directing the Defendants to disgorge the profits, sales receipts, and accounts deposits and withdrawals of the corporation.

COUNT IX:

SPECIFIC PERFORMANCE

72. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 71, as if fully set forth hereat.

73. To secure the Plaintiff's position in the land, and to secure their equity position in the corporation, and to secure Plaintiff Chris' position in management, and in consideration for Plaintiff Chris signing the Quit Claim to Beverly, Beverly simultaneously signed a Warranty Deed in favor of Chris, effectively reconveying the said land interest.

74. The agreement between the parties included the following specific promises and commitments to the Plaintiffs:

a. The employment of the Plaintiff Chris, as full time management of the restaurant.

b. The equity position owning 50% of the shares of the corporation/restaurant.

c. The reconveyance to Chris of the one half/joint interest in parcel 2.

75. Plaintiffs pray for an Order directing the Defendants to specifically perform on the said obligations, or in the alternative, and only as an alternative, to pay the damages for the breach thereof, as set forth above, and as more fully proven at trial.

COUNT X:

JUDICIAL EVALUATION AND DISSOLUTION

76. Plaintiffs incorporate by this reference the allegations of the foregoing paragraphs 1 through 75, as if fully set forth hereat.

77. The Plaintiffs pray, as the last alternative for justice, that the Court conduct a judicial evaluation of the shares of the corporation, and give the Plaintiffs the opportunity to buy out the Defendants' interest.

78. If the Plaintiffs are unable to buy out the Defendants, the Defendants should have the opportunity to do so.

79. If neither party can or will buy out the other, the corporation should be dissolved, and the assets used to retire the

agreed debts, then used to pay the Plaintiffs' damages as plead, then the balance used to pay all other debts, and the net balance, if any, split equally between the first four shareholders.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

COUNT I

i. Judgment for damages in lost income and costs of not less than $7,500 per month, from the date the Plaintiffs moved to Utah for this opportunity.

ii. General damages for breach in an amount not less than $100,000, the exact amount to be proven at trial.

iii. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNTS II and III and VII

i. An Order directing the Defendants to reestablish the officers and directors as first constituted,

ii. An Order indemnifying the Plaintiff from all unauthorized actions taken by the Defendants

iii. General damages in an amount not less than $100,000, the exact amount to be proven at trial.

iv. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNT IV

i. An Order removing Defendant Shumway as an officer of the corporation.

ii. AN Injunction against Shumway, restraining her from unfairly competing with the Plaintiffs, or from revealing confidential trade secrets or corporate information.

iii. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNT V

i. Judgment in the amount of not less than $7,500 for converted personal property.

ii. An order directing the immediate return of the balance of the property being unlawfully held.

iii. In the event the property is lost or essentially destroyed, the award of $15,000.00 as compensation therefore.

iv. If the said property is recovered and delivered to the Plaintiffs, awarding the Plaintiffs a fair amount for the damage or waste resulting from improper use or storage.

v. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNT VI

i. Ordering a Receiver appointed at Defendants' sole expense, to take interim control of the corporate assets and the operations of the restaurant business, during the pendency of these matters. In this regard, the Receiver should be appointed to review the books and records of the corporation and all accounts, since it's inception.

ii. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

VIII

i. Issuing an immediate and permanent injunction against the Defendants, and each of them jointly and severally, restraining each of them, and all acting with or for any of them, from:

a. restricting the Plaintiffs access to the property.

b. restricting the Plaintiffs access to the books and records of the corporation.

c. the transfer, encumbering, or otherwise diminishing in value of any corporate assets or opportunities.

ii. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNT IX

i. Ordering the Defendant s to specifically perform under the agreement, to include:

a. The employment of the Plaintiff Chris, as full time management of the restaurant.

b. The equity position owning 50% of the shares of the corporation/restaurant.

c. The reconveyance to Chris of the one half/joint interest in parcel 2.

ii. General damages in an amount not less than $100,000, the exact amount to be proven at trial.

iii. Fees and costs in an amount to be proven at trial, but not less than $5,000.00.

COUNT X

i. A judicial evaluation of the shares of the corporation, giving the Plaintiffs the opportunity to buy out the Defendants' interest.

ii. If the Plaintiffs are unable to buy out the Defendants, the Defendants should have the opportunity to do so.

iii. If neither party can or will buy out the other, the corporation should be dissolved, and the assets used to retire the agreed debts, then used to pay the Plaintiffs' damages as plead, then the balance used to pay all other debts, and the net balance, if any, split equally between the first four shareholders.

ON ALL COUNTS

i. Interest at the highest statutory rate.

ii. such other relief as to the Court seems just under the circumstances.

DATED AND SIGNED THIS ___ DAY OF ______________________, 19___.

____
MARK K. STRINGER
Attorney for Plaintiffs

2

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Our File No. 23,628

Attorneys for Defendant Swanson Enterprises, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs. BEVERLY SWANSON, an individual, and CLINTON SWANSON, an individual, and NIKKI SWANSON, an individual; and BEVERLY SWANSON, CLINTON SWANSON, AND NIKKI SWANSON, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business, Defendants.	**ANSWER AND COUNTERCLAIM** Case No. 960400307CN Judge Steven L. Hansen

ANSWER

COMES NOW the defendant Swanson Enterprises, Inc., a Utah corporation, and answers the Complaint of the plaintiffs as follows:

FIRST DEFENSE

The complaint fails to state a claim for which relief can be granted and, therefore, should be dismissed with this defendant being awarded its attorney fees and costs for the defense of the same.

SECOND DEFENSE

With respect to the specific allegations of the complaint, this defendant admits and denies the same as follows:

1. This defendant admits the allegations contained under the caption "Jurisdiction, Parties, Venue," identified as paragraphs 1, 2, 3, 4, 6 and 7.

2. This defendant denies the allegations contained under the caption "Jurisdiction, Parties, Venue," identified as paragraphs 5, 8, 9 and 10.

3. With respect to Count I, this defendant admits and denies the allegations contained in paragraph 11 as it incorporates by reference its responses to paragraphs 1 through 10 above.

4. With respect to the allegations contained in the remainder of Count I, this defendant admits and denies the same as follows:

    a. This defendant admits the allegations contained in paragraphs 15 and 16 of said Count.

    b. With respect to the allegations contained in paragraph 13 of Count I, this defendant admits that the plaintiffs were initially to be equal shareholders of the business, but that circumstances changed shortly after the incorporation which caused stock to be issued in a form different than original envisioned by the parties. All other allegations of said paragraph are denied.

c. With respect to paragraph 14 of Count I, this defendant admits that the plaintiff Chris Swanson was to be the original president and a director and that the plaintiff Laurie Swanson was to be the secretary of the corporation, but that those offices changed shortly after initial formation of the corporation.

d. With respect to paragraph 18 of Count I, this defendant admits that restructuring of the shares of the corporation occurred, but the purpose for such restructuring was both the facilitating of the SBA loan and the additional capital contribution required by the SBA of the defendants Beverly Swanson and Clinton Swanson. This defendant denies all other allegations of this paragraph.

e. With respect to paragraph 19 of Count I, this defendant admits that the restructuring did take place but denies each and every other allegation contained in paragraph 19.

f. This defendant denies the allegations contained in paragraphs 21, 22, 23, 24, 25 and 26 of Count I and specifically also denies each and every other allegation contained in Count I not specifically admitted.

g. This defendant admits that the Articles of Incorporation were signed by the parties on or about March 9, 1995, as alleged in paragraph 12 of the Complaint, but denies each and every other allegation contained in said paragraph.

h. In response to paragraph 17 of the Complaint, this defendant affirmatively alleges that the stock ownership changed due to a recapitalization of the corporation and infusion of new capital and services by the other defendants. This defendant denies each and every other allegation of said paragraph.

i. In response to paragraph 20 of the Complaint, this defendant affirmatively alleges that the duty to have prepared the bylaws, appropriate minutes, and new stock certificates and submit them to the other directors for approval belonged to Chris Swanson. He has failed and refused to do so. This defendant denies each and every other allegation of said paragraph.

5. In response to paragraph 27 of Count II, this defendant incorporates its responses to paragraphs 1 through 26 above.

6. This defendant admits that it has filed a document with the Division of Corporations indicating the present status of the corporation, but denies each and every other allegation contained in paragraph 28 of Count II.

7. This defendant admits the allegations contained in paragraph 29 of Count II of the Complaint.

8. This defendant denies the allegations contained in paragraphs 30, 31 and 32 of Count II.

9. With respect to paragraphs 33 and 34 of Count II of the Complaint, this defendant is without sufficient knowledge as to form a basis of opinion or belief and, therefore, denies the same.

10. In response to paragraph 35 of the Complaint, this defendant denies the allegations contained in said paragraph.

11. In response to paragraph 36 of the Complaint, this defendant admits the allegations contained in said paragraph insofar as they accurately reflect the written documents, and deny all allegations inconsistent with such documents. This defendant further states that the documents were prepared by the plaintiffs or done at their direction, acting in a fiduciary capacity to this defendant.

12. In response to paragraph 37 of the Complaint, this defendant admits that plaintiff Chris Swanson signed a quit claim deed in favor of the defendant Beverly Swanson, but denies each and every other allegation contained in paragraph 37 of the Compliant. This defendant affirmatively states that the parol evidence rule applies, as each of the documents are fully integrated documents and unambiguously state the facts shown thereon.

13. In response to paragraph 38 of the Complaint, this defendant admits the allegations contained in said paragraph as long as they are consistent with the warranty deed (Exhibit I), but deny all other allegations of said paragraph.

14. In response to paragraph 39 of the Complaint, this defendant is without sufficient knowledge as to the allegations contained in said paragraph and, therefore, denies the same.

15. This defendant denies the allegations contained in paragraphs 40, 41 and 42 of the Complaint, and further alleges that the plaintiff Chris Swanson had the duty to make certain that all approvals were obtained and that the construction occurred in a proper manner and at a proper location.

16. In response to paragraph 43 of the Complaint, this defendant incorporates its responses to paragraphs 1 through 42 above.

17. This defendant denies the allegations contained in paragraphs 44 and 45 of Count II of the Complaint.

18. In response to paragraph 46 of the Complaint, this defendant incorporates by reference its responses to paragraphs 1 through 45 above.

19. This defendant denies the allegations contained in paragraphs 47, 49, 50 and 51 of Count IV of the Complaint. In further answering the allegations of paragraph 47 of the Complaint, this defendant affirmatively alleges that the plaintiff Chris Swanson prepared the "Corporation Information Form" with Nikki Shumway listed as an officer.

20. This defendant denies the allegations contained in paragraph 48 of the Complaint.

21. In response to paragraph 52 of Count V of the Complaint, this defendant incorporates its responses to paragraphs 1 through 51 above.

22. This defendant denies the allegations contained in paragraphs 53, 56, 57 and 58 of Count V of the Complaint.

23. This defendant is without sufficient knowledge as to the allegations contained in paragraphs 54 and 55 of the Complaint upon which to form a basis of belief and, therefore, denies the same.

24. In response to paragraph 59 of the Complaint as contained in Count VI of the same, this defendant incorporates its responses to paragraphs 1 through 58 above.

25. In response to paragraph 60 of the Complaint, this defendant admits that the plaintiffs were initially in charge of the day-to-day operations and books of the corporation, but denies the remainder of the allegations contained in paragraph 60 of the Complaint.

26. This defendant denies the allegations contained in paragraphs 61, 62, 63 and 64 of the Complaint.

27. In response to paragraph 65 of the Complaint, this defendant incorporates its responses to paragraphs 1 through 64 above.

28. This defendant denies the allegations contained in paragraphs 66, 67 and 68 of the Complaint.

29. In response to paragraph 69 of the Complaint, this defendant incorporates its responses to paragraphs 1 through 68 above.

30. This defendant denies the allegations contained in paragraphs 70 and 71 of the Complaint.

31. In response to paragraph 72 of the Complaint, this defendant incorporates its responses to paragraphs 1 through 71 above.

32. This defendant is without sufficient knowledge as to the allegations contained in paragraph 73 of the Complaint upon which to form a basis of opinion or belief and, therefore, denies the same.

33. In response to paragraph 74 of the Complaint, this defendant finds said paragraph unintelligible, and since it cannot determine what agreement is being referenced, it, therefore, denies the allegations contained in said paragraph.

34. In response to paragraph 75 of the Complaint, this defendant denies the allegations contained therein.

35. In response to paragraph 76 of the Complaint, this defendant incorporates its responses to paragraphs 1 through 75 above.

36. This defendant denies the allegations contained in paragraphs 77, 78 and 79 of the Complaint.

37. This defendant denies each and every allegation not specifically admitted herein.

THIRD DEFENSE

(Affirmative)

This defendant pleads laches, estoppel, waiver and unclean hands of the plaintiffs in regard to the allegations contained in plaintiffs' Complaint.

FOURTH DEFENSE

(Affirmative)

At all times relevant to the matters asserted in this action, the plaintiffs owed a fiduciary duty to this defendant as officers, directors and shareholders of the same.

WHEREFORE, the defendant Swanson Enterprises, Inc., having fully answered the Complaint of the plaintiffs, prays that the same be dismissed and that it be awarded its attorney fees and costs for the defense of the same, together with the relief prayed for in the Counterclaim below.

COUNTERCLAIM

COMES NOW the defendant Swanson Enterprises, Inc., a Utah corporation, and complains of the plaintiffs by way of counterclaim as follows:

1. At all times complained of herein, the plaintiffs were officers, directors and shareholders of the defendant Swanson Enterprises, Inc.

2. The plaintiff Chris Swanson was the initial president of Swanson Enterprises, Inc. and had the primary responsibility for the formation and initial operations of the corporation.

3. The plaintiff Laurie Swanson was the initial secretary of the corporation and had the primary responsibility for the preparation and maintenance of certain records of the corporation.

4. By virtue of the offices held by the plaintiffs, they owed a fiduciary duty to the defendant Swanson Enterprises, Inc.

5. Upon the initial set-up of the corporation, the plaintiff Chris Swanson assumed the day-to-day affairs of the corporation and was responsible for disbursements of funds.

FIRST CAUSE OF ACTION

(Accounting)

6. This defendant incorporates the allegations contained in paragraphs 1 through 5 of this counterclaim as though fully set forth herein.

7. The plaintiff Chris Swanson made disbursements from corporate funds which were not authorized by the board of directors but which required such authorization. Even though he had responsibility for day-to-day operations in the initial phases of the corporation, certain disbursements could not to be made without express authority of the board of directors of the corporation.

8. Specifically, the plaintiffs were to receive no compensation until the business of the corporation was open and profitable.

9. The plaintiffs commenced to pay themselves wages for services rendered to the corporation without authorization by the board of directors.

10. The plaintiffs caused health insurance premiums for themselves to be paid by the corporation without authorization by the board of directors.

11. Upon information and belief, this defendant alleges that the plaintiffs removed other funds from the corporation and paid personal bills. There is approximately $56,000.00 unaccounted for in corporate funds for which the records are in the exclusive possession of the plaintiffs.

12. Upon information and belief, this defendant alleges that the plaintiffs may have even repaid themselves for their capital contribution or their share of the payment on the property contributed as capital to the corporation.

13. The defendant Swanson Enterprises, Inc. is entitled to an accounting of the funds disbursed by the plaintiffs during the time they were in control of the corporation's financial affairs, and for an order of restitution or, in the alternative, judgment for amounts wrongfully distributed.

SECOND CAUSE OF ACTION

(Failure of Consideration)

14. This defendant incorporates the allegations contained in paragraphs 1 through 13 of this counterclaim as though fully set forth herein.

15. As alleged above and upon information and belief, the plaintiffs have repaid themselves for the capital contributions they have made to the corporation in exchange for stock.

16. Such repayment was done without the authorization of the board of directors and in violation of the required capital needed by the corporation to operate its affairs.

17. The stock being issued to the plaintiffs was therefore issued without consideration and is void.

18. The corporation is entitled to an order of restitution by the Court ordering that any shares issued to the plaintiffs are void.

THIRD CAUSE OF ACTION

(Declaratory Judgment)

19. This defendant incorporates the allegations contained in paragraphs 1 through 18 of this counterclaim as though fully set forth herein.

20. The initial issuance of shares to the plaintiffs was as follows:

Chris Swanson	2,500 shares
Laurie C. Shepard-Swanson	2,500 shares

21. As an alternative to the allegations contained in the Second Cause of Action above, if the Court finds that the consideration for the shares initially issued was valid, the corporation is entitled to recall said shares and reissue new shares as follows as part of a recapitalization plan adopted by the corporation:

Chris Swanson	1,900 shares
Laurie Swanson	900 shares

22. A dispute has arisen between the parties as to the proper number of shares owned by the plaintiffs.

23. The corporation is entitled to an order of the Court by way of declaratory judgment declaring how many shares are properly owned by the plaintiffs.

FIFTH CAUSE OF ACTION

(Malicious Prosecution)

24. This defendant incorporates the allegations contained in paragraphs 1 through 23 of this counterclaim as though fully set forth herein.

25. The plaintiff Chris Swanson has employed this litigation and the use of the lis pendens to interfere with this defendant's business.

26. Prior to the time of filing this litigation, the plaintiff Chris Swanson made threats to this defendant that he would interfere with the legitimate business relationships of this defendant as a means to acquire a settlement favorable to him.

27. The use of civil litigation in this case has been done as a weapon to damage the defendant's business and is calculated to intentionally interfere with this defendant's economic relations by improper means.

28. The plaintiff Chris Swanson has sent letters and faxes to various business contacts, creditors and taxing authorities of this defendant with the intent to interfere with its prospective economic relations.

29. Such actions constitute the tort of malicious prosecution, or, in the alternative, interferes with prospective economic relations of this defendant.

30. This defendant is entitled to damages in an amount established at the time of trial incurred as a result of the filing of this action and the other interference by the plaintiffs with business relations and prospective relationships of economic advantage to the corporation.

WHEREFORE, this defendant prays for relief on its counterclaim as follows:

1. For an accounting of the funds disbursed by the plaintiffs during the time they were in control of the corporation's financial affairs, and for an order of restitution or, in the alternative for a judgment for amounts wrongfully distributed, and for attorney fees to force such accounting since plaintiff owed a fiduciary duty to this defendant and breached such duty by failing to so account.

2. For an order of the Court ordering that any shares issued to the plaintiffs are void for lack of consideration or failure of consideration.

3. In the alternative, for a declaratory order declaring how many shares are properly owed by the plaintiffs.

4. For damages, costs and attorney fees for malicious prosecution and interference by the plaintiffs with the business relations and prospective relationships of economic advantage to the corporation.

5. For such other relief as may be proper.

DATED this 12 day of June, 1996.

JOHN L. VALENTINE, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendant
Swanson Enterprises, Inc.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 12 day of June, 1996.

Mark K. Stringer, Esq.
Blakelock & Stringer
37 East Center, 2nd Floor
Provo, UT 84606

Thomas W. Seiler, Esq.
Robinson, Seiler & Glazier
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Provo, UT 84603

SECRETARY

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

JUL 3 4 33 PM '96

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IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs. BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., *a Utah business,* Defendants.	**COUNTERCLAIM** Civil No. 960400307CN Judge:

COME NOW the Defendants Beverly Swanson, Clinton Swanson, and Nikki Shumway, and for a cause of action against the Plaintiffs allege as follows:

1. At all times complained of herein, the Plaintiffs were officers,

(EXHIBIT "M")

directors and shareholders of the Defendant Swanson Enterprises, Inc.

2. The Plaintiff Chris Swanson was the initial president of Swanson Enterprises, Inc., and had the primary responsibility for the formation and initial operations of the corporation.

3. The Plaintiff Laurie Swanson was the initial secretary of the corporation and had the primary responsibility for the preparation and maintenance of certain records of the corporation.

4. By virtue of the offices held by the Plaintiffs, they owed a fiduciary duty to the individual Defendants.

5. Upon the initial set-up of the corporation, the Plaintiff Chris Swanson assumed the day-to-day affairs of the corporation and was responsible for disbursements of funds.

FIRST CAUSE OF ACTION
(Accounting)

6. These Defendants incorporate the allegations contained in paragraphs 1 through 5 of this Counterclaim as though fully set forth herein.

7. The Plaintiff Chris Swanson made disbursements from corporate funds which were not authorized by the board of directors but which required such authorization. Even though he had responsibility for day-to-day operations in the initial phases of the corporation, certain disbursements could not be made without express authority

of the board of directors of the corporation.

8. Specifically, the Plaintiffs were to receive no compensation until the business of the corporation was open and profitable.

9. The Plaintiffs commenced to pay themselves wages for services rendered to the corporation without authorization by the board of directors.

10. The Plaintiffs caused health insurance premiums for themselves to be paid by the corporation without authorization by the board of directors.

11. Upon information and belief, these Defendants allege that the Plaintiff removed other funds from the corporation and paid personal bills. There is approximately $56,000.00 unaccounted for in corporate funds for which the records are in the exclusive possession of the Plaintiffs.

12. Upon information and belief, these Defendants allege that the Plaintiffs may have even repaid themselves for their capital contribution or their share of the payment on the property contributed as capital to the corporation.

13. These Defendants are entitled to an accounting of the funds disbursed by the Plaintiffs during the time they were in control of the corporation's financial affairs, and for an order of restitution or, in the alternative, judgment for amounts wrongfully distributed.

SECOND CAUSE OF ACTION
(Failure of Consideration)

14. These Defendants incorporate the allegations contained in paragraphs 1 through 13 of this Counterclaim as though fully set forth herein.

15. As alleged above and upon information and belief, the Plaintiffs have repaid themselves for the capital contributions they have made to the corporation in exchange for stock.

16. Such repayment was done without the authorization of the board of directors and in violation of the required capital needed by the corporation to operate its affairs.

17. The stock issued to the Plaintiffs was therefore issued without consideration and is void.

18. These Defendants are entitled to an order of restitution by the Court ordering that any shares issued to the Plaintiffs are void.

THIRD CAUSE OF ACTION
(Declaratory Judgment)

19. These Defendants incorporate the allegations contained in paragraphs 1 through 18 of this Counterclaim as though fully set forth herein.

20. The initial issuance of shares to the Plaintiffs was as follows:

Chris Swanson	2,500 shares
Laurie C. Shepard-Swanson	2,500 shares

21. As an alternative to the allegations contained in the Second Cause of action above, if the Court finds that the consideration for the shares initially issued was valid, the Defendants are entitled to recall said shares and reissue new shares as follows as part of a recapitalization plan adopted by the corporation:

Chris Swanson	1,900 shares
Laurie Swanson	900 shares

22. A dispute has arisen between the parties as to the proper number of shares owned by the Plaintiffs.

23. The Defendants are entitled to an order of the Court by way of declaratory judgment declaring how many shares are properly owned by the Plaintiffs.

FIFTH CAUSE OF ACTION
(Malicious Prosecution)

24. The Defendants incorporate the allegations contained in paragraphs 1 through 23 of this Counterclaim as though fully set forth herein.

25. The Plaintiff Chris Swanson has employed this litigation and the use of the lis pendens to interfere with the business of the Defendant corporation, in which the individual Defendants have significant interest as shareholders, officers and directors.

26. Prior to the time of filing this litigation, the Plaintiff Chris Swanson made threats to these Defendants that he would interfere with the legitimate business relationships of these Defendants as a means to acquire a settlement favorable to him.

27. The use of civil litigation in this case has been done as a weapon to damage the Defendants' business and is calculated to intentionally interfere with these Defendants' economic relations by improper means.

28. The Plaintiff Chris Swanson has sent letters and faxes to various business contacts, creditors, and taxing authorities of these Defendants with the intent to interfere with their prospective relations.

29. Such actions constitute the tort of malicious prosecution, or, in the alternative, interference with prospective economic relations of the Defendants, and constitutes slander.

30. These Defendants are entitled to damages in an amount established at the time of trial incurred as a result of the filing of this action and the other interference by the Plaintiffs with business relations and prospective relationships of economic advantage to the Defendants.

WHEREFORE, these Defendants pray for relief on their counterclaim as follows:

1. For an accounting of the funds disbursed by the Plaintiffs during the

time they were in control of the corporation's financial affairs, and for an order of restitution, or, in the alternative, for a judgment for amounts wrongfully distributed, and for attorney's fees to force such accounting since Plaintiffs owed a fiduciary duty to these Defendants and breached such duty by failing to so account.

2. For an order of the Court ordering that any shares issued to the Plaintiffs are void for lack of consideration or failure of consideration.

3. In the alternative, for a declaratory order declaring how many shares are properly owned by the Plaintiffs.

4. For damages, costs, attorney's fees for malicious prosecution and interference by the Plaintiffs with the business relations and prospective relationships of economic advantage to the Defendants.

5. For such other and further relief as to the Court may seem just and proper in the circumstances.

DATED this 8th day of July, 1996.

ROBINSON, SEILER & GLAZIER, LC

Thomas W. Seiler

Thomas W. Seiler

CERTIFICATE OF MAILING

I hereby certify that a correct copy of the foregoing was mailed this 3rd day of July, 1996, postage prepaid, addressed as follows:

Mark K. Stringer
Blakelock & Stringer
37 East Center,
Second Floor, Front
Provo, UT 84606

John L. Valentine
Howard, Lewis & Petersen
P.O. Box 778
Provo, UT 84603

G:\SEILER\SWANSON.CCL

Mark K. Stringer, #4418
BLAKELOCK & STRINGER, P.A.
Attorneys for Plaintiffs
37 East Center, Suite 200
Provo, Utah 84606
Telephone: 375-7678

JUL 17 4 34 PM '96

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs BEVERLY SWANSON, et al, Defendants.	RESPONSE TO COUNTERCLAIM CIVIL NO.960400307

COME NOW the Plaintiffs in the above entitled matter, by and through counsel of record, and as and for a Response to the Counterclaim by Defendants BEVERLY SWANSON, CLINTON SWANSON, and NIKKI SHUMWAY, admit, deny, allege, demand, and assert as follows:

1. Plaintiffs incorporate by this reference the allegations, assertions, and all other matters as set forth in paragraphs 1 through and including 79 of the Complaint on file herein, as if fully set forth hereat.

2. Admit the allegations and consent to the relief requested in paragraphs 1, 2 (only as to the position of Chris Swanson as President), 3 (only as to the position of Laurie Swanson as Secretary), 4, 13 (only as to the need for and right to request an accounting of <u>all</u> corporate funds from inception to the present),

(EXHIBIT "A1")

and 22 of the Counterclaim.

3. Plaintiffs deny the balance of the allegations and requested relief set forth in the Counterclaim, not specifically admitted to hereby.

4. Plaintiffs affirmatively state and alledge that at no time have they misused their corporate office, misused or misappropriated corporate funds or opportunities, or in any manner breached their fiduciary duties to the other shareholders of the corporation.

5. Because of the actions of the Counterclaimants, the Plaintiffs have had to incur and claim the right to recover from the Plaintiff, attorneys fees and costs in the minimum amount of $1000.00, the exact amount to be proven by affidavit at the time of trial or judgment.

6. Defendants have attempted on numerous occasions to settle this matter amicably, and the Plaintiffs have refused to do so.

7. The Counterclaimants have abused their positions as officers, directors and shareholders in the subject company, to attempt to force the Plaintiff to accept less than their agreed stock, or to forego participation altogether.

8. The filing of this claim in the face of the aforesaid information, constitutes a bad faith claim under UCA 78-27-56, entitling the Defendants to recover fees and costs.

9. The Defendant is entitled to recover sanctions and/or fees and costs in an amount not less than $1000.00, the exact amount to be proven at trial by testimony or affidavit.

AFFIRMATIVE DEFENSES

In addition to the Affirmative Defenses which may apply under the factual matters alleged, or the denials thereof, the Defendants allege the following specific Affirmative Defenses:

A. ESTOPPEL / CLEAN HANDS. Counterclaimants do not have clean hands in this matter, with regard to the transactions between the parties, and with regard to the operation of the corporation and the development of the business, and therefore the Counterclaimants are estopped from asserting the right to recover any amount from the Plaintiffs, and are obligated to specifically perform on the various agreements.

B. BENEFIT OF THE BARGAIN. The Counterclaimants have already received the benefit of any agreement regarding the development of the business, as a result of the good faith efforts of the Plaintiffs, specifically having coerced and encouraged the Plaintiffs to provide the efforts and opportunities which made possible the development of the business.

C. UNJUST ENRICHMENT. Having already received the benefit of any agreement regarding the development of the business, to now allow the Counterclaimants to rewrite or altogether avoid the agreements, would allow them to keep the benefits conferred in good faith, without paying the agreed "price" therefore, and would therefore constitute unjust enrichment.

D. FAILURE TO STATE A CAUSE OF ACTION. The Counterclaim fails to state a cause of action generally, and specifically fails as to the individual Plaintiffs.

E. SET OFF. The Plaintiffs have and are entitled to claim set offs against the Counterclaims, in an amount to be proven at the time of trial.

F. PARTIAL PERFORMANCE. The parties have made several oral agreements or amendments to the original agreements concerning the development of the business, on which the Plaintiffs have relied to their detriment in partial performance (arranging for financing, making improvements, foregoing other opportunities), which partial performance takes the agreements out of application of the Statute of Frauds.

WHEREFORE, Plaintiffs (incorporating by this reference, the judgment requested in the Prayer in the Complaint) pray the Counterclaim be dismissed and the Counterclaim Defendants take nothing thereby, but if the Counterclaims not dismissed, that the Defendants recover no more than the undisputed amounts and relief as set forth in the foregoing Response.

DATED AND SIGNED THIS 15th DAY OF July, 1996.

MARK K. STRINGER
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that on the 15th day of July, 1996, I mailed a copy of the foregoing RESPONSE via first class postage prepaid addressed to John Valentine, 120 E. 300 N., Provo, Utah, and to Tom Seiler, 80 N. 100 E., Provo, Utah.

Linda Stringer
Secretary

HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW

Jackson Howard
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Leslie W. Slaugh
F. Richards Smith III
Richard W. Daynes
Phillip E. Lowry
Kenneth Parkinson

OF COUNSEL
S. Rex Lewis

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120 East 300 North Street
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Salt Lake Office:
Highland Park Plaza Bldg.
3098 S. Highland Dr., Suite 354
Salt Lake City, Utah 84106
Telephone: (801) 463-9660
Facsimile: (801) 487-8825

File No 23.628

Reply to:
Provo Office ■
Salt Lake Office ☐

August 16, 1996

Mark K. Stringer, Esq.
Blakelock & Stringer
37 East Center, 2nd Floor
Provo, UT 84606

Re: Swanson v. Swanson Enterprises

Dear Mark:

I recently discovered in a review of my files that the first set of interrogatories and requests for production of documents you served on Swanson Enterprises has never been answered. I have sent a copy of those discovery requests previously to the officers of the corporation, but I have not had a response on them. Enclosed, however are the responses to the requests for admissions.

I will be out of town for approximately a week, and as soon as I get back, I will follow through with them. In the meantime, I have sent another copy of the remaining discovery to them and have asked that they prepare preliminary answers for my review.

In a related matter, I note that you have not responded to the counterclaim which we filed on behalf of the corporation. I note that you have responded to Tom Seiler's counterclaim, but apparently have not ever filed an answer to our counterclaim.

I anticipate that the discovery will start moving forward once I return after August 27, 1996. I look forward to talking with you more then.

Sincerely,

HOWARD, LEWIS & PETERSEN

Valentine

John L. Valentine

JLV/lo
Enclosure

(EXHIBIT "O")

HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW

Jackson Howard
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Leslie W. Slaugh
F. Richards Smith III
Richard W. Daynes
Phillip E. Lowry
Kenneth Parkinson

OF COUNSEL
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Provo Office:
120 East 300 North Street
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In-State Toll Free: (800) 846-0283

Salt Lake Office:
Highland Park Plaza Bldg.
3098 S. Highland Dr., Suite 354
Salt Lake City, Utah 84106
Telephone: (801) 463-9660
Facsimile: (801) 463-6658

File No. 23,628

Reply to:
Provo Office ■
Salt Lake Office ☐

November 7, 1996

Mark K. Stringer, Esq.
Blakelock & Stringer
37 East Center, 2nd Floor
Provo, UT 84606

Re: Chris Swanson, et al. v. Swanson Enterprises, Inc.

Dear Mark:

Enclosed please find our delayed answers to interrogatories and reply to requests for production of documents.

As I stated in my earlier letter, you still have not replied to our counterclaim. I have not taken a default judgment, since you have been considerate to allow me time to answer the interrogatories, requests for admissions and the requests for production of documents. So that we have an accurate record, I have prepared a Stipulation which accompanies this letter, so that your reply will be deemed timely to my counterclaim, and my answers and responses to your discovery will be deemed timely.

Please sign the Stipulation and return the same to me along with your reply to our counterclaim.

Sincerely,

HOWARD, LEWIS & PETERSEN

John L Valentine jr

John L. Valentine

JLV/lo
Enclosure: Stipulation
J:\JLV\STRINGER.LO

(EXHIBIT "D")

JOHN L. VALENTINE (3310), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 23,628

Attorneys for Swanson Enterprises, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs. BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business, Defendants.	**STIPULATION** Case No. 960400307CN Judge ________________

Plaintiffs, by and through their counsel of record, Mark K. Stringer, and the defendant Swanson Enterprises, Inc., a Utah corporation, by and through its counsel of record, John L. Valentine, hereby stipulate as follows:

1. The plaintiffs' reply to defendant Swanson Enterprises, Inc.'s counterclaim shall be filed within ten days from the date of this Stipulation, and if so filed, shall be deemed timely.

(EXHIBIT "Q")

2. The defendant Swanson Enterprises, Inc.'s answers and responses to plaintiffs' Interrogatories, Requests for Admissions and Demand for Production of Documents shall be deemed to have been timely filed, and all parties waive any objection to any late filing of responses to said discovery.

7?

DATED this _____ day of November, 1996.

MARK K. STRINGER, for:
BLAKELOCK & STRINGER
Attorneys for Plaintiffs

DATED this _____ day of November, 1996.

JOHN L. VALENTINE, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendant Swanson
Enterprises, Inc.

7/97

Swanson-vs-Swanson, et. al.

(case # 96-040-0307 CN)

Judge Anthony W. Schofield

In accordance with Utah code 78-51-34, I, Laurie Swanson, Plaintiff, respectfully request that Mark Stringer be removed as Attorney for Plaintiff in this matter, & that Plaintiff be granted 20 days to retain new counsel.

Respectfully,

Laurie Swanson
Plaintiff

June 27, 1997

Kathie Lee

KATHIE LEE
NOTARY PUBLIC • STATE of UTAH
[illegible] WEST BANK
[illegible] CENTER
PR[illegible] UTAH [illegible]4606
COMM. EXP. 6-11-98

(EXHIBIT "R")

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
JUL 23 11 36 AM '97

Jerry Schollian (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiff

IN THE FOURTH DISTRICT COURT FOR THE STATE OF UTAH
IN THE COUNTY OF UTAH

CHRIS SWANSON and LAURIE SWANSON

Plaintiffs,

vs.

BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah Corporation,

Defendants.

PLAINTIFFS' RULE 60(b)(7) MOTION TO SET ASIDE PARTIAL SUMMARY JUDGMENT AND REQUEST FOR A HEARING AND PLAINTIFFS' RESPONSE TO PLAINTIFF'S RULE 54(B) MOTION

Civil No. 960400397

Judge Anthony W. Schofield

Def

MOTION

COMES NOW Plaintiffs, by and through their attorney of record, and hereby move this Court to set aside the partial summary judgment, (hereinafter "judgment"), entered in this matter on or about December 9, 1997, on the grounds that said judgment was entered as a result of inadvertence, mistake, excusable neglect and incompetence of counsel and on the grounds that it would be in the furtherance of justice to try this matter on its merits. This motion is supported by memorandum which is set forth below and incorporated herein by this reference

MEMORANDUM

STATEMENT OF FACTS

1. On or about November 9, 1996, the above-named individual defendants filed a

(EXHIBIT "[illegible]")

motion for partial summary judgment, (hereinafter "motion"), in this matter with supporting memorandum.

2. Plaintiffs' attorney did not reply to defendants' motion.

3. On or about December 9, 1996, this Court entered a ruling, granting the defendants' motion.

4. On or around June 12, 1997, the defendants entered a motion for a Rule 54(b) determination.

5. On June 8, 1997, Mr. Mark Stringer, former attorney of the plaintiffs, prepared an affidavit in support of a Rule 60(b) Motion to set aside the Defendant Corporation's summary judgment in this matter. See Exhibit A, a true and accurate copy of affidavit of Mr. Mark Stringer.

6. Mr. Stringer never informed plaintiffs of defendants' motion. See Exhibit B, a true and accurate copy of plaintiff's affidavit in support of this motion, at ¶ 3.

7. Plaintiffs have never had the opportunity to respond to the allegations set forth in the defendants' motion. As a result of the partial summary judgment entered by this Court in this action on December 6, 1996, the Lis Pendens that was filed in this matter was released. See Exhibit B at ¶ 4-5.

8. Plaintiffs were told by Mr. Stringer as recently as June 8, 1997 that the Lis Pendens was still in place. See Exhibit B at ¶ 4.

9. Plaintiffs have never had the opportunity to respond to the allegations set for by the affidavit of Beverly Swanson filed in support of the defendants' motion for partial summary judgment. See Exhibit B at ¶ 5.

10. Plaintiffs were never provided with copies of most of the documentation or filings of Mr. Stringer, although plaintiff's continually requested status reports and action on this matter. See Exhibit B at ¶ 6.

11. Plaintiffs have been diligent in following up with Mark Stringer and his office by

phone and/or fax. See Exhibit B at ¶ 7.

12. Plaintiffs first became aware of the partial summary judgment motion, and the entry of the partial summary judgment, on July 27, 1997, when Laurie Swanson personally went to the Fourth District Court and obtained copies of the Court's file. See Exhibit B at ¶ 8.

13. Plaintiffs have been assured by Mark Stringer and his office that all necessary extensions to respond to discovery had been granted and no adverse actions had occurred as recently as June 10, 1997. Plaintiffs were never informed by Mr. Stringer or his office that their stock certificates had been voided by this Court's Summary Judgment. See Exhibit B at ¶ 9.

14. As a result of this Court's entry of the partial summary judgment on December 6, 1997, and the subsequent entry of this Court's summary judgment, plaintiffs have lost all of their investment in Swanson, Inc. and have lost the opportunity for an equitable resolution of the dispute between the parties. It would be an unconscionable injustice if this Court were to uphold the partial summary judgment which was entered as a consequence of the mistakes of Mr. Stringer, and not any mistake or failure on plaintiffs' part. See Exhibit B at ¶ 12.

ARGUMENTS

I. UT. R. CIV. P. 60(b)(7) IS SUFFICIENTLY BROAD TO PERMIT THIS COURT TO SET ASIDE THE DEFENDANTS' PARTIAL SUMMARY JUDGMENT ON THE GROUNDS OF INEFFECTIVE COUNSEL

Ut. R. Civ. P. 60(b)(7) states in pertinent part:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:. . . (7) any other reason justifying relief from the operation of the judgment. the motion shall be made within a reasonable time for reasons (1), (2), (3) and (4), not more than 3 months after the judgment, order, or proceeding was entered or taken.

The language of Ut. R. Civ. P. 60(b) clearly shows that the three (3) month time limit set forth in rule 60(b) does not apply to rule 60(b)(7).

In Stewart v. Sullivan, 506 P.2d 74, (Utah 1973), the Utah Supreme Court held that Rule 60(b)(7) was sufficiently broad to set aside an order dismissing a parties' complaint. In *Stewart*, the appellant showed that the court's final order was entered upon the erroneous assumption that the plaintiff has procrastinated in the response to discovery. The facts in the *Stewart* are somewhat similar to the facts in the case at bar. In *Stewart,* the Utah Supreme Court stated:

> The plaintiff has no knowledge of the dismissal and subsequent motion made in respect thereto. It was not until several months after his counsel became incapacitated to represent him and the plaintiff had employed other counsel he learned what has transpired... In view of the above recited circumstances and the fact that there was not disposition of the case on the merits, we are of the opinion that the court below did not abuse its discretion in its determination that the action should be dismissed without prejudice.
>
> *The provisions of Rule 60(b) are broad are sufficiently broad to permit the court to set aside its former order which appeared to have been entered upon an erroneous assumption and to enter a new order based on the record before it.*
>
> Id. at 76. emphasis added

In Gillmor v. Wright, 850 P.2d 431 (Utah 1993) the Utah Supreme Court strengthened the *Stewart* ruling that a "reasonable time" under rule 60(b) is based on the facts of each case, the reasons for delay , the practical ability of the litigant to learn earlier of the grounds relied upon and the prejudice to the parties. Id. at 435, *citing* Laub v. South Central Utah Tel. Ass'n, 657 P.2d at 1306.

Clearly, the facts in the case at bar justify setting aside the defendant's partial summary judgment. The plaintiffs are the victims of circumstances well beyond their control. Such circumstances resulted in the nullification of their shares in a corporate entity that had a vested interest in. The facts are clear that the plaintiff's could not have learned about the individual defendants' motion for partial summary judgment until such time as they sought the question the representations of their attorney, Mr. Stringer. It is clear the maintaining the partial summary judgment would prejudice the plaintiffs by depriving them of their property without the opportunity to try this matter on its merits.

In the case at bar, it is clear that this Court has entered a partial summary judgment based, at least in part, by the assumption that the plaintiff's were procrastinating in completing an answer to the defendants' motion. It is clear from the plaintiffs' affidavit that plaintiffs had not abandoned their case, but that Mr. Stringer had, at least inadvertently, neglected to answer the defendants' motion. To deprive the defendants of their opportunity to try this matter on its own merits, due to the mistakes and mishandling of this matter by Mr. Stringer, would be an unconscionable miscarriage of justice.

Conclusion

Due to the above-stated facts and circumstances, the plaintiffs have been deprived of their opportunity to try this matter on its own merits. Defendants' motion and subsequent partial summary judgment was entered without the plaintiffs having the opportunity to respond to the facts asserted. The partial summary judgment entered against the plaintiffs is a result of a mistake, inadvertence and incompetence of which the parties had no control. In the furtherance of justice, this Court must set aside the partial summary judgment and allow the plaintiff's the opportunity to present the merits of their case to the Court.

WHEREFORE; Plaintiffs' pray for the following relief from this Court.

1. An order setting aside the Partial Summary-Judgement entered in this matter on December 6, 1996.

2. An order providing the plaintiff's sufficient time to respond to the Defendants' motion for partial summary judgment.

3. A hearing to be set in this matter in accordance with the availability of the parties' respective counsels and this Court.

4. A joint hearing to be held in the matter of this motion, and the plaintiff's rule 60(b) motion to set aside this Courts Summary Judgment in this matter.

5. The setting aside of the defendants' Rule 54(b) motion until such time as the plaintiffs' motions to set aside the summary judgment and partial summary judgment entered in this matter are heard.

6. Any and all other relief this Court sees fit to grant.

RESPECTFULLY SUBMITTED on this 23rd day of July, 1997.

Jerry Schollian
Attorney at Law

CERTIFICATE OF MAILING

This certifies that the undersigned has mailed a true and accurate copy of the preceding document to the following parties:

Original to:

Fourth District Court
Attention Civil Clerk
125 North 100 West
Provo, UT 84603

Copy to:

Mr. John Valentine
c/o Howard, Lewis & Peterson
120 East 300 North
P.O. Box 1248
Provo, UT 84603

Mr. Tom Seiler
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

DATED this 23rd day of July, 1997.

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

JUL 2 11 42 AM '97

Jerry Schollian (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiff

IN THE FOURTH DISTRICT COURT FOR THE STATE OF UTAH
IN THE COUNTY OF UTAH

CHRIS SWANSON & LAURIE SWANSON Plaintiffs,	PLAINTIFFS' RULE 60(b) MOTION TO SET ASIDE JUDGMENT AND REQUEST FOR A HEARING
vs.	Civil No. 960400397
BEVERLY SWANSON, an individual, et al. Defendants.	Judge Anthony W. Schofield

MOTION

COMES NOW Plaintiffs, by and through their attorney of record, and hereby moves this Court to set aside the judgment entered in this matter on or about May 12, 1997, on the grounds that said judgment was entered as a result of inadvertence, mistake and excusable neglect on the part of the plaintiffs' former counsel, and on the grounds that it would be in the furtherance of justice to try this matter on its merits. This motion is supported by memorandum which is set forth below and incorporated herein by this reference

MEMORANDUM

STATEMENT OF FACTS

1. On or about February 11, 1997, defendant Swanson Enterprises, Inc. (hereinafter "Defendant Corporation") filed a motion for summary judgment in this matter with supporting memorandum.

2. Plaintiffs did not reply to Defendant Corporation's motion for summary judgment.

1 of 4 Pages
Plus affidavit

3. On April 7, 1997, the Honorable Anthony W. Schofield entered a ruling, granting the Defendant Corporation's motion for summary judgment.

4. On May 13, 1997, this Court entered Findings Of Fact And Conclusions Of Law based on the Defendant Corporation's motion for summary judgment and the plaintiffs' failure to respond.

5. On or around June 12, 1997, the individual defendants in this matter, (hereinafter "Defendants"), entered a motion for a Rule 54(b) determination.

6. On June 8, 1997, Mr. Mark Stringer, former attorney of the plaintiffs, prepared an affidavit in support of a Rule 60(b) Motion to set aside the Defendant Corporation's judgment in this matter. See Exhibit A, a true and accurate copy of affidavit of Mr. Mark Stringer.

7. On June 27, 1997, plaintiffs filed a notice pursuant to Utah Code Ann. § 78-51-34, (1953 as amended), requesting that Mr. Stringer be removed as the plaintiffs' attorney in this matter and that the plaintiff's be granted twenty (20) days to retain new counsel. See Exhibit B, a *true and accurate copy of Plaintiffs' request to have Mr. Stringer removed.*

8. On July 2, 1997, the plaintiffs' retained Mr. Schollian as their attorney, who filed an appearance of counsel on that date.

9. The plaintiffs' were unaware that Mr. Stringer had not replied to the Defendant Corporations' motion for summary judgment.

ARGUMENTS

I. THE SUMMARY JUDGMENT ENTERED IN THIS MATTER SHOULD BE SET ASIDE ON THE GROUNDS OF INADVERTENCE, MISTAKE AND EXCUSABLE NEGLECT

Ut. R. Civ. P. 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party of his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, sunrise, or excusable neglect; . . ..

The facts and circumstances in this matter are similar to the those in Interstate

Excavating v. Agla Dev. Corp., 611 P.2d 369, (Utah 1980). In *Interstate* the Utah Supreme Court held that when defendant's attorney withdrew and the defendant received no notice to appear or retain counsel, and had no notice of trial until he [the defendant] received notice of default, that it was in the furtherance of justice to set the judgment aside.

In the case at bar, the plaintiffs had absolutely no notice of any motion for summary judgment, and were unaware of Mr. Stringer's inability to respond to the motion until they examined the court file and discovered the entry of judgment on June 27, 1997.

The plaintiffs have been deprived of their opportunity to try this matter on the merits due to no fault of their own. If the defendant's would have been make aware of Mr. Stringer's difficulties, they would have had the opportunity to either assist Mr. Stringer, or find new counsel to represent them in their cause of action.

Conclusion

Due to the above-stated facts and circumstances, the plaintiffs have been deprived of their opportunity to try this matter on its own merits. The summary judgment was entered without the plaintiffs having the opportunity to respond to the facts asserted by the Defendant Corporation. The judgment entered against the plaintiffs is a result of a mistake and inadvertence in which the parties had no control. In the furtherance of justice, this Court must set aside the judgment and allow the plaintiff's the opportunity to present the merits of their case to the Court.

WHEREFORE; Plaintiffs' pray for the following relief from this Court.

1. An order setting aside the Judgement entered in this matter on April 7, 1997.
2. An order providing the plaintiff's sufficient time to respond to the Defendant Corporation's motion for summary judgment.
3. A hearing to be set in this matter in accordance with the availability of the parties' respective counsels and this Court.

4. Any and all other relief this Court sees fit to grant.

RESPECTFULLY SUBMITTED on this 2nd day of July, 1997.

Jerry Schollian
Attorney at Law

CERTIFICATE OF MAILING

This certifies that the undersigned has mailed a true and accurate copy of the preceding document to the following parties:

Original to:

Fourth District Court
Attention Civil Clerk
125 North 100 West
Provo, UT 84603

Copy to:

Mr. John Valentine
c/o Howard, Lewis & Peterson
120 East 300 North
P.O. Box 1248
Provo, UT 84603

Mr. Tom Seiler
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

DATED this 2nd day of July, 1997.

Mark K. Stringer, #4418
BLAKELOCK & STRINGER, P.A.
Attorneys for Plaintiffs
37 East Center, Suite 200
Provo, Utah 84606
Telephone: 375-7678
Facsimile: 375-0704

DEPARTMENT I, PROVO
IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, **vs** BEVERLY SWANSON, an individual, et al, Defendants.	AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S RULE 60 MOTION TO SET ASIDE DEFAULT, ORDER, JUDGMENT CIVIL NO.__________ JUDGE:________________

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

COMES NOW Mark K. Stringer, being first duly sworn, deposes and says as follows:

1. I am an attorney licensed to practice in the state of Utah.

2. I am the counsel for the Plaintiffs.

3. I was unaware of the Motion and Order for summary disposition until late in May, 1997.

4. I recall being late on the responses to discovery, and seeking some extension for preparing and providing the responses.

5. At the time of the Motion and Order summarily dismissing this matter, I was still under the impression that I had an extension to respond to discovery, and to further respond to other pending matters.

6. In or about February, 1997, I was suffering from illness, and having trouble concentrating on work matters. I was relying heavily on my primary secretary, Linda, who was by that time serving essentially as a paralegal, and managing all of the communication, mail, and scheduling.

7. My illness and the inordinate complication of several cases, combined to put an inordinate amount of pressure on both Linda and I. Unfortunately, I was forced to place even more responsibility on her.

8. Both of us got behind in responding to mail and correspondence. As indicated earlier, we contacted opposing counsel and believe we made arrangements for extensions and notice on the more critical and immediate pending matters.

9. In mid April, Linda received a calling/job offer from the LDS Church offices. She was interviewed and "hired" on Thursday, and asked to begin full time the following Monday.

10. Because of the source of the employment, we did not feel free to extend the starting time, or to refuse the opportunity.

11. I immediately began to interview secretaries.

12. I hired one secretary, who lasted about a week, and simply got overwhelmed and left without notice.

13. About a week or so later, at the suggestion of a client, I hired his daughter, who stated that she would be able to work full time, and intended to remain at the job for the foreseeable future. She, too, left in about a week, leaving a note that she had accepted a job that had been pending since before she came to us.

14. The difficulty in having two secretaries quit without notice was exacerbated by the fact that Linda's time for training was limited, and she had spent several days and evenings training both replacements, and had little time and energy left for repeated demands.

15. Further, we discovered weeks later that both secretaries had become overwhelmed with mail and scheduling demands, and had simply piled away mail and phone messages, rather than bring them to my attention. It was not until weeks later, when we received notices and calls from counsel and the Court, that we realized the matters that had gone into the pile.

16. My third secretary is working hard to correct these matters.

17. We have hired a third year law student to clerk for the summer, and he is also working to organize and identify the more critical matters.

18. Rose, with whom I practice, has separate staff, and we have routinely separated mail and scheduling, so that her staff does not handle mine.

19. In the middle of all this, I was working longer hours, and succumbed to bronchial pneumonia and pleurisy in one lung. 20. About a month ago, my wife became very ill, and was unable to manage the children, which took more of my time. Eventually, she was diagnosed with ovarian cysts and additional problems, which are then subject of a biopsy study.

21. Needless to say, I have been very burdened and distracted by all of these events. I have made every effort to remain on top of the more critical matters, and have transferred way cases where I felt that the transfer would not unreasonably impact on the case and client.

22. In the midst of all this, the subject Motion and Order were entered.

23. I never notified my clients, as the matter was not discovered until, late, and the communication from the office to clients was limited to known immediate and emergency matters, and the response to the Order did not require their direct participation.

24. My clients have provided the responses to discovery, and they can be ready to serve on counsel within a week of having notice to do so.

25. All of these several matters can be substantiated with medical records at the various doctors offices and medical centers in Utah County.

26. Under the circumstances, it would be a significant disservice and injustice to the Plaintiffs to have their case

dismissed due to the events which led to my own neglect and inadvertence.

Signed this 8th day of June, 1997.

MARK K. STRINGER

SWORN AND SUBSCRIBED TO BEFORE ME THIS 8th DAY OF June, 1997.

NOTARY PUBLIC

LINDA STRINGER
NOTARY PUBLIC • STATE of UTAH
BLAKELOCK & STRINGER
37 EAST CENTER 2ND FL
PROVO, UT 84606
COMM. EXP. 4-12-99

100

Swanson-vs-Swanson, et. al
(case # 96-040-0307 CN)
Judge Anthony W. Schofield

In accordance with Utah code 78-51-34, I, Laurie Swanson, Plaintiff, respectfully request that Mark Stringer be removed as Attorney for Plaintiff in this matter, & that Plaintiff be granted 20 days to retain new counsel.

Respectfully,

Laurie Swanson
Plaintiff

June 27, 1997

Kathie Lee

KATHIE LEE
NOTARY PUBLIC • STATE of UTAH
WEST BANK
CENTER
PH 4506
COMM EXP. 6-11-98

bit B

FILED IN
4th DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

MAR 9 12 56 PM '98

Kate A. Toomey, #6446
Assistant Counsel
OFFICE OF PROFESSIONAL CONDUCT
645 South 200 East
Salt Lake City, Utah 84111
(801) 531-9110

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

In the Matter of the Discipline of:

MARK K. STRINGER, #4418

Respondent.

ORDER FOR INTERIM SUSPENSION

Civil No. 980403638

Judge Ray Harding, Jr.

The Court having reviewed the Petition for Interim Suspension and the Stipulation To Interim Suspension, along with the Memorandum attached to the Stipulation, and having been fully advised in the premises:

IT IS HEREBY ORDERED that:

1. Respondent is hereby suspended from the practice of law on an interim basis.

2. This Order shall become effective on March 1,1998.

3. The Respondent shall comply with all requirements of Rules 26(b) of the Rules of Lawyer Discipline and Disability.

(EXHIBIT "U")

4. Pursuant to Rule 26(e) of the Rules of Lawyer Discipline and Disability willful failure to comply with Rule 26(b) shall constitute contempt of court and may be punished as such or by further disciplinary action.

DATED this 9 day of March, 1998.

Guy R. Burningham
Judge
District Court Judge

ORIGINAL SIGNED IN INK

APPROVED AS TO FORM:

Rosemond Blakelock
Attorney For Respondent
Mark K. Stringer

CHRIS AND LORI SWANSON
1025 N LOUISE ST
GLENDALE CA 91207

UNITED STATES BANKRUPTCY COURT
District of Utah

IN RE: Case No.: 97 - 29189
Mark K. Stringer and Linda B. Stringer
Debtor(s). Chapter: 13

NOTICE OF DISMISSAL

You are hereby notified that an Order Dismissing the above case was entered on 5/13/98.

Dated May 13, 1998

William C. Stillgebauer
Clerk of Court

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(EXHIBIT "V")

Mark K. Stringer, #4418
BLAKELOCK & STRINGER, P.A.
Attorneys for Plaintiffs
37 East Center, Suite 200
Provo, Utah 84606
Telephone: 375-7678
Facsimile: 375-0704

DEPARTMENT I, PROVO
IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs BEVERLY SWANSON, an individual, et al, Defendants.	AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S RULE 60 MOTION TO SET ASIDE DEFAULT, ORDER, JUDGMENT CIVIL NO.__________ JUDGE:_______________

STATE OF UTAH)
: ss.
COUNTY OF UTAH)

COMES NOW Mark K. Stringer, being first duly sworn, deposes and says as follows:

1. I am an attorney licensed to practice in the state of Utah.

(EXHIBIT "W")

2. I am the counsel for the Plaintiffs.

3. I was unaware of the Motion and Order for summary disposition until late in May, 1997.

4. I recall being late on the responses to discovery, and seeking some extension for preparing and providing the responses.

5. At the time of the Motion and Order summarily dismissing this matter, I was still under the impression that I had an extension to respond to discovery, and to further respond to other pending matters.

6. In or about February, 1997, I was suffering from illness, and having trouble concentrating on work matters. I was relying heavily on my primary secretary, Linda, who was by that time serving essentially as a paralegal, and managing all of the communication, mail, and scheduling.

7. My illness and the inordinate complication of several cases, combined to put an inordinate amount of pressure on both Linda and I. Unfortunately, I was forced to place even more responsibility on her.

8. Both of us got behind in responding to mail and correspondence. As indicated earlier, we contacted opposing counsel and believe we made arrangements for extensions and notice on the more critical and immediate pending matters.

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13. About a week or so later, at the suggestion of a client, I hired his daughter, who stated that she would be able to work full time, and intended to remain at the job for the foreseeable future. She, too, left in about a week, leaving a note that she had accepted a job that had been pending since before she came to us.

14. The difficulty in having two secretaries quit without notice was exacerbated by the fact that Linda's time for training was limited, and she had spent several days and evenings training both replacements, and had little time and energy left for repeated demands.

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21. Needless to say, I have been very burdened and distracted by all of these events. I have made every effort to remain on top of the more critical matters, and have transferred way cases where I felt that the transfer would not unreasonably impact on the case and client.

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24. My clients have provided the responses to discovery, and they can be ready to serve on counsel within a week of having notice to do so.

25. All of these several matters can be substantiated with medical records at the various doctors offices and medical centers in Utah County.

26. Under the circumstances, it would be a significant disservice and injustice to the Plaintiffs to have their case

dismissed due to the events which led to my own neglect and inadvertence.

Signed this 8th day of June, 1997.

MARK K. STRINGER

SWORN AND SUBSCRIBED TO BEFORE ME THIS 8th DAY OF June, 1997.

NOTARY PUBLIC

LINDA STRINGER
NOTARY PUBLIC • STATE of UTAH
BLAKELOCK & STRINGER
37 EAST CENTER 2ND FL
PROVO, UT 84606
COMM. EXP. 4-12-99

Jerry Schollian (6326)
A Professional Corporation
37 East Center Street, Suite 208
Provo, UT 84601
Tel: (801)-377-6500

Attorney for Plaintiff

IN THE FOURTH DISTRICT COURT FOR THE STATE OF UTAH
IN THE COUNTY OF UTAH

CHRIS SWANSON & LAURIE SWANSON Plaintiffs, vs. BEVERLY SWANSON, an individual, et al. Defendants.	**AFFIDAVIT OF CHRIS SWANSON AND LAURIE SWANSON** 7/15/97 Civil No. 960400307 Judge Anthony W. Schofield

FILE COPY

STATE OF CALIFORNIA }
ss.
COUNTY OF Los Angeles }

Chris Swanson and Laurie Swanson, being first duly sworn, do hereby collectively depose and state:

1. We are of the age of majority and do possess the capacity and personal knowledge to attest to the facts stated herein;

2. We originally retained Mr. Mark Stringer to represent us in this matter.

3. Mr. Stringer never informed us of the motion for partial summary judgment filed by the individual defendants, by and through their attorney of record Mr. Thomas Seiler, on November 6, 1996.

4. We have never had the opportunity to respond to the allegations set forth in the defendants' motion for partial summary judgment. As a result of the partial summary judgment entered by this Court in this action on December 6, 1996, the Lis Pendens that was filed in this matter was released. We were told by Mr. Stringer as recently as June 8, 1997 that the Lis Pendens was still in place.

5. We have never had the opportunity to respond to the allegations set for by the affidavit of Beverly Swanson filed in support of the defendants' motion for partial summary judgment.

(EXHIBIT "X")

6. We were never provided with copies of most of the documentation or filings of Mr. Stringer, although we continually requested status reports and action on this matter.

7. We have been diligent in following up with Mark Stringer and his office by phone and fax.

June 22 97

8. We first became aware of the partial summary judgment motion, and the entry of the partial summary judgment, on ~~July 27, 1997,~~ when Laurie Swanson personally went to the Fourth District Court and obtained copies of the Court's pleadings file.

9. We had been assured by Mark Stringer and his office that all necessary extensions to respond to discovery had been granted and no adverse actions had occurred as recently as June 10, 1997. We were never informed by Mr. Stringer or his office that our stock certificates had been voided by this Court's Summary Judgment.

10. We are confident that the findings of this court, entered as a result of Mr. Stringer's failure to respond to the motion for partial summary judgment, and the finding of the Court as a result of the summary judgment entered on May 13, 1997, can be disproved if we are given the opportunity to present our own facts and evidence.

11. It is in the interests of justice that this court set aside its findings and judgment entered in the defendants' motion for partial summary judgment, and summary judgment, so that this matter can be tried on its merits.

12. As a result of this Court's entry of the partial summary judgment on December 6, 1997, and the subsequent entry of this Court's summary judgment, we have lost all of our own investment in Swanson, Inc. and have lost the opportunity for an equitable resolution of the dispute between the parties. It would be a terrible and unconscionable miscarriage of justice if this Court were to uphold the above-stated judgments which were entered as a consequence of the mistakes Mr. Stringer, and not any mistake or failure on our part. We now plead with this Court to do the only just thing in this matter, and set aside the partial summary judgment and the summary judgment in this matter.

RESPECTFULLY SUBMITTED on this 15 day of July, 1997.

Chris Swanson

Chris Swanson
Plaintiff

SUBSCRIBED to and sworn before me on this 15 day of July, 1997.

Public Notary

CATERNIA SOLOMON
COMM. #1084841
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires January 28, 2000

RESPECTFULLY SUBMITTED on this 15th day of July, 1997.

Laurie Swanson
Plaintiff

SUBSCRIBED to and sworn before me on this 15 day of July, 1997

CATERNIA SOLOMON
COMM. #1084841
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Comm. Expires January 28, 2000

Caternia Solomon
Public Notary

CERTIFICATE OF MAILING

This certifies that the undersigned has mailed a true and accurate copy of the preceding document to the following parties:

Original to:

Fourth District Court
Attention Civil Clerk
125 North 100 West
Provo, UT 84603

Copy to:

Mr John Valentine
c/o Howard, Lewis & Peterson
120 East 300 North
P.O. Box 1248
Provo, UT 84603

Mr. Tom Seiler
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

DATED this _____ day of July, 1997.

____

(copy)

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * *

CHRIS SWANSON)

Plaintiff,)

) Civil No. 960400307

vs.) HEARING TRANSCRIPT

)

BEVERLY SWANSON)
Defendant.)

)

BE IT REMEMBERED that on the 4th day of September, 1997, the HEARING was video recorded before the Honorable Anthony Schofield and was transcribed by Richard C. Tatton, a Certified Shorthand Reporter and Notary Public in and for the State of Utah at the Fourth Judicial District Court Building, Provo, Utah 84601

(EXHIBIT "Y")

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APPEARANCES

For the Plaintiff:
Mr. Jerry Schollian
Attorney at Law
Provo, Utah 84601

For the individual Defendants Swanson and Shumway:
Mr. Tom Seiler
Attorney at Law
80 North 1st East
Provo, Utah 84606

For the Defendant Corporation:
Mr. John Valentine
Attorney at Law
120 East 300 North
Provo, Utah 84606

THE COURT: This is in the matter of Swanson vs. Swanson Civil No. 9604400307, Counsel if you will identify yourselves.

MR. SCHOLLIAN: Jerry Schollian for the plaintiffs.

MR. SEILER: Mr. Thomas Seiler for the individual Defendants Swanson and Shumway, Your Honor.

MR. VALENTINE: John Valentine for the Defendant corporation, Your Honor.

THE COURT: Thank you. This matter is before the court on two motions a motion brought by the plaintiffs seeking under Rule 60B to set aside judgments and a motion under 54B to certify that the judgments as final judgments.

MR. SEILER: Your Honor, I believe my motion is first in time, the 54B Motion and perhaps that should be the order that it be taken in. It is up to you.

THE COURT: That will be fine. I would urge you counsel, I have read everything in the file except the affidavits that were just handed to me in the last 10 minutes. I have not read them. You don't need to be unduly long.

MR. SEILER: We won't, Your Honor. Your Honor, Rule 54B provides that various types of orders can be certified as being finalized. The rule, a three prong rule there has to be multiple claims for relief that the decision or ruling would be appealable except that there are other claims or others parties that haven't been fully resolved and there is no reason to delay the appeal. I think that all three of those prongs are met. That those prongs are found in Montague vs. Molly and we have quoted that case to the court and I am sure the court has had a chance to consider that.

Our motion was filed in June 12th of 1997. There was no response until after the request for ruling. We requested the ruling on July the 7th of 1997. The response finally came on July the 23rd of 1997. The response, as I read it, reads that simply and that is found on Page 5, Paragraph 5 that they are asking the prayer for relief that the court set aside the Defendant's Rule 54B Motion. I am not sure what that means to set it aside. I assume it means that the plaintiffs would like the court to deny or to fail to grant that motion. There is no basis set forth in their memorandum and I think that is well taken because there is no basis to not have this court certify and we can get this portion of the case resolved and whatever is left, we can get in front of the court for trial purposes. This part of the case there is appealable issues can go before the Supreme Court or the Court of Appeals whatever is appropriate and we would be able to move this case along.

One of the things that has happened here is that we had a very broad complaint. There are 10 counts in this complaint and it is really a fairly simple transaction. The transaction is simply that the family started a restaurant and there was some property upon which the restaurant would be built and the whole issue surround whether or not the various family members are owners of property and owners of an interest in the restaurant. It is a fairly simply case that has a very complex lawsuit filed, and it seems to me that the way to get this matter before a Judge or a jury in a timely fashion is to have those matters which have been decided certified up under Rule 54B and that would be both the judgment that was a partial summary judgment that was issued on December the 9th of 1996 and the partial summary judgment that was issued on May the 13th of 1997. The first judgment went in favor of the individual defendants and the second judgment in favor of both of the defendants.

THE COURT: Let me ask, what issues remain undecided?

MR. SEILER: There are still some issues of personal property. The plaintiffs' claim that the Defendant Shumway has some personal property in her possession and they make some claims about that. I think they still make some claims that I don't believe are satisfied about monies that the plaintiff believes the corporation defendant owes them for wages and that type of thing. Many of these issues have been decided. I think that those are the ones that we need.

THE COURT: Mr.Schollian you respond to his motion.

MR. SCHOLLIAN: Let me give you some background, This case was being handled by Mr. Mark Stringer. The affidavit that you probably have read, Your Honor,was attached to the 60B Motion, the affidavit of both Mr. Swanson and his wife Laurie Swanson and it indicates that throughout the period of their hiring Mr. Stringer that he had indicated to them that things were being taken care of. That everything was well and that things are being recorded.

My client never even knew about opposing counsel's motion at all until in June when Mrs. Swanson came to this area, they both live in California, looked it up and found it.

Mr. Stringer, was going to file an affidavit which with the same motion indicating that he was sick and that he was ill and that he couldn't get to things. He did not get things done.

In response to opposing counsel's motion, I should address the Rule 60B7 Motion.

THE COURT: I don't want you to right now and let them argue their motions.

MR. SCHOLLIAN: The judgment shouldn't be final, because my client's position is the judgment should be set aside because it was entered.

THE COURT: Is that the only reason you think it should not be certified under Rule 54B is you think I should grant your Rule 60B Motion?

MR. SCHOLLIAN: Yes.

THE COURT: Any other reason, other than that that I should set it aside?

MR. SCHOLLIAN: No.

THE COURT: All right.

MR. SCHOLLIAN: Because if the facts Rule 60B Motion are not found to be so, then there is no defense. The parties are not well represented in this case and they relied on Mr. Stringer.

THE COURT: Isn't their remedy not in this court but against Mr. Stringer?

MR. SCHOLLIAN: Perhaps for the issues of their damages arising from him but as far as their equity in this case it is here and they never had the opportunity to- -

THE COURT: What do you mean they never had the opportunity. They clearly had the opportunity. Their rightswere never taken away from them without them being parties to this lawsuit. They are parties to this lawsuit. They have a claim that their attorney malpracticed, not that the court entered a judgment improperly.

MR. SCHOLLIAN: Well, the court entered its judgment on the presumption that the plaintiffs had procrastinated and not responded to- -

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THE COURT: On the record before the court that is exactly what happened.

MR. SCHOLLIAN: That isn't what happened according to my clients' affidavit which is before you. They had made continued - -

THE COURT: Go ahead and make your Rule 60B arguments.

MR. SCHOLLIAN: I will start on Rule 60B7 and 60B are two motions as you well know. My client is represented today and they are both here.They hired Mr. Stringer sometime early last year in this case. They asked him to represent them in a matter where their family had an argument over some very extensive property and my client Mr. Swanson had put a lot of his time and effort and personal resources into making this business start. Mr. Stringer represented to them that he had carried the case forward and that was all well with this case.

Now Rule 60B7 states that for any other reason a judgment can be set aside. Opposing counsel has stated that the controlling case in this matter is the Lincoln Case. I have wanted to present that case, Your Honor, because that case should not be the controling case in this matter because the court in that case specifically stated that each case requires 60B7 the facts and circumstances of each case. In the Lincoln matter the defaulting parties were the defendants not the plaintiffs. The defaulting party had received numerous service supplementary motions had been served orders to appear in court for several weeks. At that time, he asked the court six months after the judgment had entered to set it aside and fire his attorney and asked that his new attorney to go forward. I am reading to you from Page 674 and I will give it to you. The court also determined in view of the surrounding circumstances that he was with the defaulting party. his negligence in continuing to rely on his attorney throughout the case.

My clients were not negligent in this case. As they stated in the affidavit before you today made numerous attempts to contact them or both Mr. Stringer and his staff. It was represented to my client by Mr. Stringer and his staff that there was no Motion for Summary Judgment. That no motion for Summary Judgment had entered. In fact, in the affidavit which has been in front of the court since July the 23rd, the plaintiffs certify that Mr. Stringer had told them on June the 10th of this year a lis pendens was still in affect when it had been dismissed and nullified several weeks earlier.

They were living in California. They had no way of checking on things than through Mr. Stringer's office. They reasonably relied on representations of what they believed was a professional looking out for their best interests.

THE COURT: Isn't their remedy against the professional?

MR. SCHOLLIAN: In the damages that they have incurred but this court does have the discretion to set aside the judgment in the interest of justice. The case law is replete with the policy that cases should be decided on the merits and not on a default judgment. These parties have not had the opportunity to do that. Not for any fault of their own. It was the fault of Mr. Stringer, not the fault of their own.

You look at the affidavit of Mr. Valentine which is replete with examples of how this man didn't do a thing.

THE COURT: Have they filed a complaint with the Bar?

MR. SCHOLLIAN: They might do that, Your Honor. At the same time, Your Honor, Mr. Stringer is telling them that things were fine . What else would they do or what else would any other reasonable person do in this case then believe their attorney when they are a 1000 miles away and that he is taking care of their case.

Now the Lincoln Case is founded on two other cases- which are vastly different then the case at bar. The Case of Pit vs Mclèlland and the Case of Law vs. Essential Utah Telephone Association. In the Pit

Case, the court again said that because of the surrounding circumstances in their case that it was not justified to set aside the judgment. It said that unless you can show that there was excusable neglect that the failure to respond to the judgment or receive a default falls under Rule 60B1 and this is a 3 month dead line. They said that because he couldn't show excusable neglect and because the facts in this case are some what different. Just give me a second. The Pit Case is a case where the parties are parties to a foreclosure judgment where they had received notice and the house had been foreclosed on. The facts of the case they wanted to change it around so they could have a better remedy. They had full notice of what was going on and my clients did not.

In the other case, this was a matter where the parties had stipulated to judgment. They had all looked at it and signed it and stipulated and entered it into the court and when the affects of the judgment came down they wanted to second guess it. The court said that you had all the notice you need, six months is too long and it is to late.

In this case it is a different story. My clients were represented to for months that this case was being moved forward by Mr. Stringer and staff. Never served any personally served any notice of any judgment. They were never personally served any document that would give them the notice they would need personally to realize that this had happened. If it would have happened, they would have been here many months ago and they were not. The Lincoln Case does not control in this matter.

I would ask the court and I would ask the court also to look at the affidavit of Mark Stringer which has been referred to you since July the 21st. That clearly shows that Mr. Stringer was either incompetent or dishonest. The case law is very clear that incompetency of counsel falls under Rule 60B7.

Would you like me to go into Rule 60B Motion, Your Honor?

THE COURT: Yes.

MR. SCHOLLIAN: Rule 60B Motion applies to the Motion for Summary Judgment filed by Mr. Valentine. This judgment does fall within the 90 day period. My client did file the motion before the 90 day period expired. Mr. Valentine has argued in his brief or his memorandum that we must show timeliness, excusable neglect and meritorious defense.

Timeliness is not an issue. I have already told you the facts that are foundation for my client's excusable neglect. This was not their neglect. This was not their foolishness that got them into this position.

Mr. Valentine has asserted in his affidavit and in his memorandum that they were not diligent. The affidavits that I have given you today and one that I have given you on the 23rd clearly shows that they were constantly in contact with Mr. Stringer. He represented things to them that were not true. They believed good faith and good faith of visitation on their part and that was also good faith that there was no Motion for Summary Judgment and they were never informed of it. They were never even told by Mr. Stringer that extensions of time had been granted to him for answering discovery and that apparently was not true. There is excuable neglect in this case.

The third prong of this is there a meritorious defense. The case that is relied on by Mr. Valentine is the Musselman Case. The State vs. Mr. Musselman. That case says essentially that the proponent must show that they have a meritorious case and have to show that they have a reasonable likelihood to prevail.

That case , however, was more thoroughly defined in the Case of Ericksen. That case was qualified by the Utah Supreme Court and this is what the Supreme Court says about the meritorious defense standard. The standard set forth in the lead opinion, the opinion in Musselman, is limited to the extent joined by Justice Howell's concurring opinion. Justice Howell agreed with the lead opinion that the trial court properly denied the Defendant's Motion to Set Aside the Default Judgment and also agreed that the dissent's decision of meritorious defense was the correct one. Specifically, Justice Howell agreed with the dissent that the court should only examine the defendant's proposed answer and determine whether it as a matter of law it contains a defense which is entitled to be tried. A defense is sufficiently meritorious to have a default set aside if it is entitled and tried.

My clients are not the defendants. They are the plaintiffs. Their meritorious offense is clearly set forth in the complaint. If this judgment is set aside their meritorious defense is already included and set forth and very specifically set forth in their complaint since the beginning of this matter.

In summation, my clients have shown they have under Rule 60B2 excusable neglect and that Lincoln does not apply. They were not negligent in relying on Mr. Stringer. It is in the best interests of justice that judgment should be set aside. I won't bother to summarize what I have already said about Rule 60B1 Motion. I will just summarize both motions by saying this, the law is clear throughout the case law in history of this state that causes of action are more justly determined on their merits not on default judgments. My client should have the opportunity to competent counsel whether that is me or someone else to try this case on the merits, not on the procedural wrong doings of someone they had a good faith reliance on.who did not act justly with them. I would ask the court to set aside both judgments and allow my client to go forward with this case in a way that is according to the procedures. I will stick my neck out here and say that if there is any sanctions in this case on any party it would not be on my clients but on Mr. Stringer.

THE COURT: Let me ask one last question. To what extent should I even read the affidavits that have been filed today in view of the fact that you are the moving party and you could have filed those affidavits a long time ago when you filed your motions.

MR. SCHOLLIAN: Your Honor, I apologize for that. My clients live in California. Two of the affidavits are not relevant to today's motion anyway. All those two affidavits are the affidavit, I believe, it is the second affidavit of Mr. Swanson. All that is is a reply to the affidavit in there. It really isn't relevant to today's hearing. All it is there for is to show the court that there is a legitimate beef here.

The other affidavit which is an affidavit of Mr. Swanson which is a response to the affidavit of Betty

Swanson. Again that isn't offered to you to offer any support for this motion. Only to show that there is a legitimate beef on showing that he disagrees with her statement of facts. To go forward with this case, counsel can rely on his testimony and affidavit to go forward.

The other two affidavits are only supplements to the affidavits already in front of you. The joint affidavit of Laurie and Chris. Those affidavits are intended to show you what they did to maintain their communications with Mr. Stringer. My intention of handing those two affidavits as I mentioned earlier is to show that there is a legitimate beef here. That my clients do have a very different view of the facts. You can look at those later.

The other two are just supplements to the affidavits that you have already . They felt, as did I, as they arrived in town yesterday and that we needed to be more specific. Mr. Valentine stated in his motion that perhaps they weren't diligent but they are diligent. They are here in the courtroom and I am just trying to save the court sometime and not have them testtfy.

THE COURT: They are not testifying. That is not a motion that calls for testimony or requires it.

MR. SCHOLLIAN: Mr. Seiler.

MR. SEILER: Thank you, Your Honor. Your Honor, as to the affidavits received today, I believe they are not timely before the court both for the practical reason that I received my copy probably after 1:00 O'clock after the time this was scheduled and obviously I haven't had the time to review them with my client. Also for the legal reason that Rule 4-501 requires these affidavits to be filed beforehand and there simply has been no effort to do so. There is nothing in these affidavits that say where they found this information and this is newly discovered and this is a surprise anything like that. It is simply information that is brought to the court at this point so there is no time to rebut it or otherwise meet it.

We believe that for those reasons that the affidavits should not be accepted and in fact should not be entered into this file. We believe that they are simply untimely and not properly before the court.

I was reviewing the Lincoln Life Insurance Case at the time that counsel was indicating that- there was many differences. I suppose, therefore, we need to spend a little bit of time with that case just to make sure that the court recalls the various things that happened in this case.

In the Lincoln Benefit Case, neither the defendants that the default were taken against filed an answer to an amended complaint. Then on February of 1990, the default was entered by the clerk and the judgment was entered in May of 1990. It goes on to say that on that in July of 1990, there were supplemental proceedings signed by the court and that they were required, Mr. Hogle, who was the person if you will, the individual that is there and he was served with that. He then again contacted his counsel, Harold Stephens, and Mr. Stephens apparently got the supplemental proceedings continued to a date in August. That neither Hogle or Stephens appeared in August. Then apparently throughout the rest of the time Mr. Stephens continued assured Mr. Hogle that there was no problem with this. It wasn't until November of 1990 that Mr. Hogle through Mr. Stephens filed a Motion to Set Aside the Default Judgment.

In his affidavit, Mr. Hogle claims that he delivered the amended complaint to his former attorney Mr. Stephens and Mr. Stephens informed him that he was handling the matter. Stephens told Hogle in April of 1990 that the answer to the amended complaint had been filed.

The affidavit of Mr. Hogle goes on to say after receiving the court's order in supplemental proceedings that he contacted Mr. Stephens again who assured him that he would take care of the matter. Finally, Hogle claimed in the affidavit, that he relied on Mr. Stephens professional skills throughout the case.

Those facts are strikingly similar. In this case, Your Honor, if you read the affidavit and if you take them at face value, Mr. Stringer was contacted from time to time from plaintiffs. He told the plaintiffs that the case was going along okay and he didn't mention to them that a Motion for Summary Judgment was filed and told them that other pleadings were being filed in a timely manner.

The court looked at all the facts in what happened between Mr. Hogle and Mr. Stephens in the Lincoln Benefit Case and said that the reasons asserted by DSP and Hogle for setting aside the default judgment namely their attorney neglected to file an answer. That Hogle relied upon his attorney's assurance that an answer had been filed followed Rule 60B1. I don't think that there is any question about that.

The court also stated that it refers to Rule 60B7 as the residuary clause and it says in order to make Rule 60B7 work, there are three prongs. First, that the reason B1 other than those listed in subdivisions one through six. As the court knows, Rule 60B1 is the excusable neglect subsection.

Second, that the reason that there is a reason for justifying relief and

Third, that the motion be made in a reasonable time.

We would submit, Your Honor, that this is simply if it is a motion that the court should even look at all has to be viewed under Rule 60B1 Motion. As a Rule 60B1 Motion, it is simply outside the time, separate and apart from any issues.

Then if you look for a moment at the issues in the case itself to this day there is nothing that meets the allegations and meets the things in the affidavit that were filed with the Motion for Summary Judgment. Our partial Motion for Summary Judgment was filed in the Fall of 1990, I am sorry, 1996, in November of 1996. We requested a ruling and it wasn't until about two and a half weeks later that the court finally entered a ruling in that matter. The copies of the notice or copies of the judgment were mailed to Mr. Stringer before signature. Thereafter, he never made any effort. There was no effort by anyone to find out about any of this on the plaintiff's side, apparently, until clear around in June. In June they apparently took the time to come to town and check and see what the file said.

I suppose that they could have from wherever they lived called the court and asked the court clerk while file number and what is happening with this case. The court clerk would have read those documents that were entered in the file and would have found that on December 10th, I believe the judgment was entered, it was signed

December the 9th and I don't think it was entered until the next day. On December the 10th it would have said partial summary judgment and then again on April the 24th, judgment rendered in favor of Mr. Valentine's client. They would have found findings of fact and conclusions of law and judgment which would have been mailed prior to signing to Mr. Stringer.

Your Honor, it seems to me that the plaintiff's simply don't meet any of the prongs of the various tests. First of all they don't meet the prong that this is something other than a Rule 60B1 Motion. They are saying that it is excusable neglect. We relied upon our attorney. He didn't do what he was supposed to do and here we are in this posture. That clearly means that there is a Rule 60B1 Motion, so it doesn't meet the first prong.

Secondly, they have to allege that there is a meritorious defense. The court in the Lincoln Benefit matter called that a reason to justify relief. They never told the court that this property somehow was Mr. Swanson's and was the plaintiffs Mr. Swanson. They don't allege any of that until we get to this affidavit that is filed today at the time of the hearing.

Third, they must allege or must be the case that the motion was filed within a reasonable time. That didn't happen. We don't have this motion filed for 8 months after the time that the judgment is entered in this matter. There is certainly nothing timely about that. Apparently, the only thing that even brings that to their attention,is they came to town in June and for whatever reason decided that they would ask the court clerk, at that time, in person when they felt like they couldn't ask then and they must assumed that because they represent to the court that they didn't know anything about it beforehand.

We get in our memorandum, Your Honor, distinquish adequately the Stewart v. Sullivan and Gillmore v. Wright, neither of those cases plaintiffs cited have any applicability and we think that is relatively clear by the reading of the facts in those cases and unless the court wants us to review them with you, I can go past that.

Just briefly, the 60B or Rule 54B Motion, Your Honor, to certify these cases or these decisions as final, I would note that counsel agrees that the only reason not to certify is that he thinks that the court should grant the Rule 60B Motion and that is not a reason that is set forth in Rule 54B. I don't know what it is. It is not a legal reason. It is the reason of counsel that doesn't have any backing in the law. For those reasons, Your Honor, we would submit that the judgment rendered in December of 1996 in favor of the individual defendants should not be set aside. We would also submit that the Rule 54B motion certifying these matters as final should be granted so if there is any appeal being taken that they can get on with that and if and when this matter goes to trial so we will know what we are trying.

THE COURT: Thank you Mr. Seiler, Mr. Valentine.

MR. VALENTINE: Thank you, Your Honor. I will give you just those items that are some what different from those of the co-defendants. We do join in the 54B Motion to have our judgment certified as final as well as we filed previously in this matter.

We also join in the objection to the affidavits which we all have received today at approximately 1:00 O'clock. They were quite a surprise and quite lengthy and we haven't had a chance to get at them as well.

A couple of points that are some what different situations for the corporate defendant and the individual defendants and that is that their motion is a Rule 60B1 Motion and it is timely as against the corporate defendant. The other two prongs of the test have not been met. In fact, as we outline in our brief, we believe that the plaintiffs in this matter actually abandoned the case long before Mr. Stringer talked about in his affidavit that he was having difficulties. It goes back right to the initial pleadings when we filed a counterclaim asserting much of the things that are resolved in our Motion for

Summary Judgment and he didn't respond to the counterclaim. On two different occasions by letter, I reminded counsel that he had not replied to our counterclaim and this matter was ripe for default judgment. Those all occurred prior to the time that he purports in his affidavit that he was having difficulty trying to keep up with his practice.

Finally, in frustration in February of this year, we filed a Motion for Summary Judgment. We gave him more time then was required by the rules. Why, I wasn't available. When I got back I saw that it still had not been responded to thinking that the matter would be resolved and submitted for decision. We submitted it for decision and still nothing. We get the ruling back. We send him a copy of that. The clerk sent him a copy of that and still nothing. We prepared proposed findings, proposed judgment and send those over to him and still nothing. They get entered and the day after they are entered, I get a form letter by our Fax Machine saying that we would like you to vacate the judgment findings of fact as shown on our affidavit. That is clearly abandonment of the case. That is what the Supreme Court characterizes as abandonment. That is not excusable neglect. That is beyond excusable neglect.

The court meant something when it says excusable neglect as part of the Rule 60B1 Motion. It didn't mean any kind of neglect totally abandoning the case. It meant something that was excusable. That is exactly what we don't have in here.

Secondly, on the meritorious defense, counsel has raised an interesting argument that somehow he now has a meritorious claim, just because he has got a claim and a complaint that somehow gives him a meritorious defense but he hasn't even proffered even in his affidavits today responses to the Motion for Summary Judgment. There is no meritorious defense until he proffers that and until he comes before the court and says that here is those items we admit. Here is the ones we dispute and here is the affidavit in support of that and here is the legal basis where we would prevail if we tried this case. He hasn't even proffered those, even untimely he hasn't proffered those. He has not purposed a meritorious defense that we can even respond to.

The court should, at this point, grant the Motion to have Rule 54B the certification of the two judgments. Let the Supreme Court argue with it if they want to but at this point and time we ought to finalize the case on just the issues that are left before the court, thank you, Your Honor.

THE COURT: Thank you Mr. Valentine.
Mr. Schollian, I will give you five minutes to respond.

MR. SCHOLLIAN: Just very briefly the Stewart Case in the memorandum I submitted under Rule 60B in that case are broad and sufficiently broad to permit the court to set aside the order which appeared to have been entered upon an assumption and to enter a new order based on the record before it. This court ordered, entered the judgment of the individual defendants based on their assumption that the plaintiff had abandoned the case.

It has clearly been shown before the court even if you eliminate the affidavits that was presented today, that Mr. Stringer did not present the truth to my clients. They were diligent in trying to keep up with him.

Again, Your Honor, I want to talk about excusable neglect. Was it excusable neglect from our clients to rely on Mr. Stringer. Not was it excusable neglect for Mr. Stringer not to do what he was supposed to do. My clients have a right to rely on him and yes they did. They are in California not in Utah.

Of course, they could have called the court and asked but they were relying on the representations of Mr. Stringer that things were fine. They had no reasonable reason to do that.

Finally, Your Honor, on the issue of meritorious defense. All of the cases cited by counsel are cases where a defendant defaulted on a complaint and that is not the case here.

If this court sets aside the, anyone of the judgments in this matter, our clients have a meritorious offense which is clearly set forth in the complaint.

Let me with the remaining two minuts that I have distinquish Lincoln from my client's case. If you will look at Lincoln Page 673, the defendant was served , a default was entered on May the 29th. He was personally served with an order on July the 18th for supplemental proceedings. That is less than 60 days. He had notice during that 60 day period that there was a judgment against him. He had no excuse not to ask the court to set it aside within the 60 day period. My clients had no such luxury. They had no idea what had happened to their case until Mr. Swanson came to this city in June of 1997.

The facts in this case are clearly different and fairly distinquishable . I would ask the court to do what is equitable today. Let's give my clients the opportunity to present their case before this court . Let us not let them lose that case because someone else blew it. I can't think of any other words to say as far as that goes.

The law is replete even in the case which we have set forth today with the policy that the cases should be decided on their merits not on defaults. I would ask the court to pursue that policy and set aside both judgments and have my clients continue on.

THE COURT: I am going to take the matter under advisement and review the file before I issue a written ruling. I would say that Mr. Schollian that if your clients believe that they were mistreated by Mr. Stringer they should file a complaint with the office of the Bar Counsel. I spoke on the phone two days ago with the office of Bar Counsel who suggested to me that if I had concerns about Mr. Stringer I should file a complaint. I simply pass that along as a suggestion of Bar Counsel speaking about this specific attorney. I think that they might be interested to hear what your clients have to say in that regard.

I will take the matter under advisement and issue you a written ruling shortly.

MR. SCHOLLIAN: Thank you.

MR. SEILER: Thank you.

MR. VALENTINE: Thank you.

(WHEREUPON, the hearing was concluded)

C E R T I F I C A T E

STATE OF UTAH)
: ss.
COUNTY OF WASATCH)

THIS IS TO CERTIFY that the HEARING was video-taped before the Honorable Anthony Scofield and was later transcribed into typewriting by Richard C. Tatton, a Certified Shorthand Reporter and Notary Public in and for the State of Utah and that it was done to the best of my ability.

I FURTHER CERTIFY that I am not of kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the event thereof.

WITNESS my hand and official seal at Midway, Utah this 1st day of April, 1998.

Richard C. Tatton
RICHARD C. TATTON, CSR

My commissionexpires:
June 15, 2001

RICHARD C. TATTON
NOTARY PUBLIC • STATE of UTAH
80 NORTH 1st EAST
MIDWAY, UT 84049
COMM. EXP. 6-15-2001

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

DEC 31 1996

CARMA B. SMITH, CLERK
________________ DEPUTY

Thomas W. Seiler, #2910
ROBINSON, SEILER & GLAZIER, LC
Attorneys for Defendants
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P.O. Box 1266
Provo, UT 84603-1266
Telephone: (801) 375-1920

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON,

Plaintiffs,

vs.

BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business,

Defendants.

ACCEPTANCE OF DISCOVERY

Civil No. 960400307CN
Judge:

COMES NOW the undersigned, counsel for the Plaintiffs, and accepts the answers to discovery filed by the Defendants Shumway and Swanson herein as being filed timely, pursuant to the agreement of the parties.

COMPLETED

(EXHIBIT "7")

DATED this 17th day of ~~June~~ July, 1996.

BLAKELOCK & STRINGER

Mark K. Stringer
Attorneys for Plaintiff

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

DEC 31 1996

CARMA B. SMITH, CLERK
DEPUTY

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Plaintiffs,

vs.

BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business,

Defendants.

CERTIFICATE OF DELIVERY OF ANSWERS TO DISCOVERY REQUESTS

Civil No. 960400307CN

Judge:

The undersigned hereby certifies that a correct copy of the Answers of Nikki Shumway, and the Answers of Beverly and Clinton Swanton, to Interrogatories, Requests for Admission, and Demand for Production of Documents, Propounded by Plaintiffs, was delivered this 17th day of July, 1996, to:

(EXHIBIT "AA")

Mark K. Stringer
Blakelock & Stringer
37 East Center
Second Floor, Front
Provo, UT 84606

Thomas W. Seiler

G:\SEILER\SWANSON.CER

-6

ENT 40379 BK 3968 PG 860
RANDALL A. COVINGTON
UTAH COUNTY RECORDER
1996 MAY 14 2:13 PM FEE 18.00 BY JD
RECORDED FOR MARK STRINGER

Mark K. Stringer, #4418
BLAKELOCK & STRINGER, P.A.
Attorneys for Plaintiffs
37 East Center
Second Floor, Front
Provo, Utah 84606
Telephone: 375-7678

MAY 14 4 22 PM '96

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs BEVERLY SWANSON, an individual, and CLINTON SWANSON, an individual, and NIKKI SHUMWAY, an individual; and BEVERLY SWANSON, CLINTON SWANSON, and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC. a Utah business Defendants.	NOTICE OF LIS PENDENS CIVIL NO. 960400307CN

COME NOW the Plaintiffs in the above entitled matter, by and through counsel of record, and hereby give NOTICE to all interested parties of an interest in and to the property held in the name of the DEFENDANTS, to wit:

> COMMENCING 22.44 FEET EAST AND 811.14 FEET NORTH 35 DEGREES 22 MINUTES WEST ALONG EASTERLY LINE OF STATE HIGHWAY FROM THE SOUTHEAST CORNER OF SECTION 26, TOWNSHIP 6 SOUTH, RANGE 2 EAST, SALT LAKE BASE AND MERIDIAN; THENCE NORTH 35 DEGREES 22 MINUTES WEST 86 FEET ALONG EASTERLY LINE OF HIGHWAY; THENCE NORTH 34 DEGREES EAST 76 FEET; THENCE SOUTH 35 DEGREES 22 MINUTES EAST 86 FEET TO CENTER LINE OF WEST UNION CANAL; THENCE SOUTH 34 DEGREES WEST 76 FEET ALONG THE CANAL TO THE PLACE OF BEGINNING.

This interest is the subject of this law suit above entitled,

(EXHIBIT "BB")

and is based upon the fact that the Plaintiffs have received from the Defendant Beverly Swanson a Deed for this property, and that the Plaintiffs have provided consideration for the acquiring of this property and have an interest in the corporation to whom Beverly Swanson has attempted to make transfer.

The Plaintiff has an interest in the adjoining property as well, through his corporate equity. These two properties are being developed as a restaurant site by the corporate Defendant.

Interested parties should make inquiry at the Fourth District Court in Provo, or at the office of Plaintiff's counsel, Mark Stringer, 375-7678.

DATED this 14th day of May, 1996.

LINDA STRINGER
NOTARY PUBLIC • STATE of UTAH
BLAKELOCK & STRINGER
37 EAST CENTER 2ND FL
PROVO, UT 84606
COMM. EXP. 4-12-99

Mark K. Stringer,
Attorney for Plaintiff

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that as copy of the foregoing was mailed first class postage prepaid addressed to:

Swanson Enterprises, c/o John Valentine, via fax 377-4991.

Beverly and Clinton Swanson, 3707 Littlerock Drive, Provo, Utah

Nikki Shumway, 140 W. 1880 North, Orem, Utah

Linda Stringer

1,10

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
3-31-97 SKF Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiff, vs. BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY, ET AL. Defendant.	**RECUSAL** CASE NO. 960400307 CN DATE: MARCH 26, 1997

RECUSAL - CASE REASSIGNED

The Honorable Steven L. Hansen has recused himself from further involvement in the above-captioned case. This matter has been reassigned to the Honorable Judge Anthony Schofield for further proceedings.

DATED this 31 day of March 1997.

Judge Steven L. Hansen

cc: Mark Stringer
Thomas Seiler
John Valentine

COMPLETE

(EXHIBIT "CC")

FILED
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
02-11-97 Deputy

JOHN L. VALENTINE (3310), for:
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Our File No. 23,628

Attorneys for Swanson Enterprises, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON,

Plaintiffs,

vs.

BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY, individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANT SWANSON ENTERPRISES, INC.'S, MOTION FOR SUMMARY JUDGMENT

Case No. 960400307CN
Judge Steven L. Hansen

Defendant Swanson Enterprises, Inc. submits this memorandum in support of its Motion for Summary Judgment.

STATEMENT OF UNDISPUTED FACTS

1. Plaintiffs, Chris Swanson ("Chris") and Laurie Swanson ("Laurie"), and the individual Defendants, Beverly Swanson ("Beverly") and Clinton Swanson ("Clinton"), formed

(EXHIBIT "DD")

Swanson Enterprises, Inc., March 9, 1995, ("the corporation") for the purpose of owning and operating a restaurant business. (See Complaint, ¶¶ 12 and 15).

2. Originally the parties anticipated that the business would engage in a small remodeling project. The parties agreed that there would be four shareholders, Beverly Swanson, Clinton Swanson, Chris Swanson, and Laurie Shepard-Swanson, with 2500 shares, or 25% of ownership, each. (See Affidavit of Nikki Shumway ("Shumway Affidavit"), ¶ 3).

3. The Plaintiffs were to contribute their services in exchange for their shares in the corporation. They have made minimal or no capital contributions to the corporation. Most of the capital has been contributed by Beverly and Clinton. (See Shumway Affidavit, ¶ 4).

4. The parties originally agreed that Chris would be president and a director, and Laurie would be secretary. The parties also originally agreed that Chris would manage the day-to-day affairs of the business, and that neither Chris nor Laurie were to receive compensation until the business was open and profitable. (See Shumway Affidavit, ¶ 5).

5. After commencing the remodeling project, the parties realized they would have to construct a new building altogether. This required that Beverly and Clinton contribute a significant amount of property to the corporation as collateral for a loan. The parties also agreed to include individual Defendant, Nikki Shumway ("Nikki"), as a shareholder and officer. Chris specifically requested her participation because of her experience in the restaurant industry. (See Shumway Affidavit, ¶ 6).

6. The parties then agreed to restructure the shares to reflect these changes. Of the total shares, Beverly was to own 39.5%, Clinton, 22.5%, Chris 19%, Nikki, 10%, and Laurie, 9%. The parties also agreed that Beverly would be president, Nikki would be secretary, and that Chris and Laurie would no longer be officers. (See Shumway Affidavit, ¶ 7).

7. These changes are reflected in the Corporate Information sheet submitted with the application materials for an SBA loan in August or September of 1995. The loan application materials were entirely prepared by Chris. (See Shumway Affidavit, ¶ 7).

8. After the parties made these changes, and after the corporation obtained the loan, Chris remained in control of the day-to-day management of the business and of the construction of the building until the time he resigned in December, 1995. (See Shumway Affidavit, ¶ 8).

9. Chris retained Laurie as bookkeeper and paid her wages without the authorization of the board of directors. The checks were made payable to Laurie and himself. (See Shumway Affidavit, ¶ 8).

10. Chris also made other disbursements of funds without the authorization of the board of directors. These transactions involving corporate funds are documented in records most of which remain in exclusive control of Chris and Laurie. They have refused to relinquish the records and account for several unauthorized disbursements of corporate funds. (See Shumway Affidavit, ¶ 10).

11. On two occasions, Nikki discovered receipts of purchases made by the Plaintiffs with corporate funds, and found that the purchases did not add up to the amount the Plaintiffs reported they had spent. (See Shumway Affidavit, ¶ 11).

12. Nikki has also recovered cancelled checks written on corporate accounts that the Plaintiffs had used for their personal purposes. (See Shumway Affidavit, ¶ 11).

13. Around December of 1995, the individual Defendants confronted Chris about the unaccounted for funds, and he resigned. Chris and Laurie no longer perform services for the business by their own choice. They have since moved from the area. (See Shumway Affidavit, ¶ 12).

14. Chris and Laurie have a key to the restaurant and the individual Defendants have not denied them access to the property. Chris and Laurie have never directly asked for disclosure of day-to-day operations of the business. (See Shumway Affidavit, ¶ 12).

15. Beverly, Clinton, and Nikki had accountants examine what records they were able to retrieve from the Plaintiffs. The records revealed that Chris and Laurie transferred the funds back and forth between three separate bank accounts. Altogether, about $30,000 to $56,000 of corporate funds remain unaccounted for. (See Shumway Affidavit, ¶ 13).

16. Stock certificates were issued April 15, 1996, according to the structure described in ¶ 6. No other stock certificates were issued before then. (See Shumway Affidavit, ¶ 15).

3

17. The corporation is financially sound and free from any danger of insolvency. (See Shumway Affidavit, ¶ 16).

18. Since the beginning of her term as an officer, Nikki has provided competent, ongoing service to the corporation. (Shumway Affidavit, ¶ 18)

19. Chris and Laurie had stored some items of their personal property at the Shumway home. None of it was ever converted to the use of Nikki or of the corporation. It was always available to Chris and Laurie. They have since retrieved the property. (See Shumway Affidavit, ¶ 17).

20. Over the past year Chris has contacted or threatened to contact a number of state agencies and business contacts, alleging that the corporation has engaged in a variety of violations of the law. Chris has stated that he has done this to force one or more of the individual defendants to "sit down with [him] and come to an agreement in principle," and has threatened that "there will be a point in the next few weeks that too much damage will have been done to go forward with the project." (See Shumway Affidavit, ¶ 18).

ARGUMENT

POINT I

ANY SHARES OWNED BY THE PLAINTIFFS ARE VOID FOR LACK OF CONSIDERATION

Stock that is issued without consideration may be cancelled and treated as void. See Flore v. Johnson, 199 P.2d 547, 555 (Utah 1948); Business Aviation of South Dakota, Inc. v.

Medivest, Inc., 882 P.2d 662, 663 n. 2 (Utah 1994); 18A Am.Jur. 2d Corporations § 505; Utah Code Ann. 16-10a-621 (1995). In Flore, the Utah Supreme Court upheld a finding that stock was subject to cancellation because it was fraudulently issued, the corporation receiving no consideration for it. In that case, the corporation issued stock in exchange for a down payment and a promise to pay the remaining consideration in installments. However, full compliance with the agreement was never accomplished. The trial court cancelled the stock and removed the parties elected as a result of the fraudulently issued stock. The Utah Supreme Court upheld this decision.

Here, the stock issued to the Plaintiffs also lacks consideration. There is no record of the Plaintiffs making any capital contributions to the corporation. They were to contribute their services in exchange for their stock, but instead, they compensated themselves for those services, converted corporate funds to their personal use, and have not worked for the corporation in over a year. As a result, the Plaintiffs have provided no benefit to the corporation entitling them to the stock. Therefore, the stock should be set aside as void and submitted for cancellation as in Flore. Furthermore, Defendant is entitled to summary judgment on each of the claims by Plaintiffs, identified below, which are predicated upon ownership in the corporation.

POINT II

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR BREACH OF FIDUCIARY DUTY

Under Count II of their Complaint, the Plaintiffs identify what they claim to be breaches of fiduciary duty committed by the officers and directors of the corporation, and request as relief that the Court reinstate the original officers and directors of the corporation.

Plaintiffs may not recover under this claim as a matter of law because it is a derivative action. In Utah, claims of mismanagment or breach of fiduciary duty may only be brought derivatively by shareholders of the corporation. Richardson v. Arizona Fuels Corp., 614 P.2d 636, 639-40 (Utah 1980); Ut. R. Civ. P. 23.1. As discussed earlier, however, any shares owned by the Plaintiffs are void for lack of consideration. Because they are not shareholders, they may not recover the relief they seek under Count II.

Even if Plaintiffs are found to be shareholders, their claim for relief is be barred by the clean hands doctrine. Courts in Utah adhere to the principle that

> equity does not reward one who has engaged in fraud or deceit in the business under consideration, but reserves its rewards for those who are themselves acting in fairness and good conscience, or as is sometimes said, to those who have come into court with clean hands.

Jacobson v. Jacobson, 557 P.2d 156, 158 (Utah 1876); see also Bradford v. Alvey & Sons, 621 P.2d 1240 (Utah 1980).

The remedy sought here is in equity, and the Plaintiffs have come into court with unclean hands. While operating in a fiduciary capacity as manager of the business, Chris paid Laurie wages without authorization of the board of directors, and otherwise converted corporate funds for their personal use. Chris and Laurie have withheld corporate records from the other shareholders, officers, and directors, and have failed to account for $30,000 to $56,000 of corporate funds. Furthermore, they engaged in the very activities they now claim to be breaches of fiduciary duty. Chris participated in the decision to restructure the organization of the corporation, specifically requesting the addition of Nikki as a shareholder and officer. He was primarily responsible for the loan application which reflected the changes of which he now complains. Chris was also responsible for the construction of the building he now claims encroaches on adjacent property. Furthermore, over the past year, the Plaintiffs have made various negative allegations about the corporation to several state agencies and business contacts in an effort to enhance their bargaining position in this matter. In general, the Plaintiffs have engaged in acts of bad faith which now prevent them from recovering the equitable relief they seek.

Furthermore, the doctrine of equitable estoppel prevents the Plaintiffs from denying the validity of the current office holders. The doctrine of equitable estoppel applies when there has been:

> (1) a statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (2) reasonable action or inaction by the other party taken or not taken on the basis

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> of the first party's statement, admission, act, or failure to act; and (3) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act or failure to act.

Avila v. Winn, 794 P.2d 20,22 (Utah 1990). Here, Chris represented in the loan application that the individual defendants were officers of the corporation. He is now contradicting those representations to the detriment of the individual defendants and the corporation, and should be estopped from making this claim.

Finally, even if Plaintiffs were found to be shareholders, they would not be able to recover under this claim because they have not complied with the statutory requirements for a derivative action. Utah R. Civ. Pro. 23.1 (1996), governing derivative actions by shareholders requires, among other things, that "the complainant [sic] shall be verified" and

> [t]he complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

The Plaintiff's complaint was not verified, and did not allege that they had made efforts to obtain the action they desire from the others in the corporation, and did not explain the failure to make the effort. Since they have failed to satisfy these statutory requirements, the Plaintiffs are not entitled to the relief they seek. Caley Investments v. Lowe, 754 P.2d 793 (Colo. Ct. App. 1988).

POINT III

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR INDEMNITY

Under Count III of their Complaint, the Plaintiffs claim to be entitled to indemnity from any claims that may follow from the alleged breaches of fiduciary duty identified under Count II. The Plaintiffs may not recover under this claim as a matter of law for the same reasons set forth earlier. They are not shareholders, and even if they are, they are barred by the doctrine of clean hands and by equitable estoppel.

Furthermore, the Plaintiffs have no right to indemnity either under common law or statute. A common law indemnity action does not arise until the party seeking indemnity pays a claim, judgment, or settlement. Davidson Lumber v. Bonneville Inv., 794 P.2d 11, 19 (Utah 1990); see also Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214 (Utah 1984). Likewise, the provisions within Utah Code Ann. §§ 16-10a-901 to 909 (1995) regarding indemnity of directors, officers, and employees of a corporation, each presuppose that an action has been brought against the party seeking indemnity. Here, the Plaintiffs have made no payments for a claim, judgment, or settlement, and have not been made a party to any action growing out of the activities of the corporation.

On the contrary, the Plaintiffs appear to be seeking a judgment declaring that they shall be entitled to indemnity in the future. However, when seeking a declaratory judgment "the legal controversy presented must be a current one rather than one that may arise at some future time."

People v. Ford, 773 P.2d 1059, 1070 (Colo. 1989); see also Baird v. State, 574 P.2d 713 (Utah 1978); Jenkins v. Finlinson, 607 P.2d 289 (Utah 1980). Plaintiffs are not entitled to the relief they seek because a cause of action for indemnity has not arisen and there is currently no legal controversy against the corporation that would give rise to a right to indemnity. Therefore, the Plaintiffs may not recover the relief they seek under Count III.

POINT IV

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR REMOVAL OF AN OFFICER

Under Count IV of their Complaint, the Plaintiffs request that Nikki be removed from office and enjoined from competing with the business. The Plaintiffs may not recover under this claim as a matter of law for the same reasons set forth earlier. They are not shareholders, and even if they are, they are barred by the doctrine of clean hands and by equitable estoppel, and they have not satisfied the statutory requirements for a derivative action.

Furthermore, while there is a statute permitting judicial removal of a director, Utah Code Ann. § 16-10a-809 (1995), there is no statute permitting judicial removal of an officer. The Utah Supreme Court in Flore v. Johnson, 199 P.2d 547 (Utah 1948), acknowledged that a court of equity usually may not remove an officer unless such relief flows naturally from the determination of other issues properly before the court. Here, the Plaintiffs are not entitled to any equitable relief because of their unclean hands. Also, removing Nikki is not in the best interest of the corporation. She provides competent, ongoing service to the corporation and removing her would unnecessarily disrupt the corporation. Therefore, the Plaintiffs may not recover the relief they seek under Count IV.

POINT V

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR CONVERSION

Under Count V of their Complaint, the Plaintiffs allege that their personal property has been converted to use of the corporation, and they seek various forms of relief. However, their claim is not supported by the facts. "A conversion is an act of willful interference with a chattel, done without lawful justification by which a person entitled thereto is deprived of its use and possession." Allred v. Hinkley, 328 P.2d 726, 728 (Utah 1958). Here, the Plaintiffs voluntarily stored their personal property in the Shumway home. It was ever withheld from them, and was never converted to the use of the corporation. Since the filing of their Complaint, the Plaintiffs have retrieved their property from the Shumway home. Therefore, there is no basis for the recovery Plaintiffs seek under Count V.

POINT VI

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR RECEIVERSHIP OR INDEPENDENT MANAGEMENT

Under Count VI of their Complaint, Plaintiffs request receivership or independent management of the corporation. The Plaintiffs may not recover under this claim as a matter of law for the same reasons set forth earlier. They are not shareholders, and even if they are, they are barred by the doctrine of clean hands and by equitable estoppel.

Furthermore, this relief is only appropriate where a corporation has been dissolved, is insolvent, or is in imminent danger of insolvency. See Utah. R. Civ. Pro. 66 (1996); Richardson v. Arizona Fuels Corporation, 614 P.2d 636, 638 (Utah 1980). Here, there is no evidence of imminent danger of insolvency. In fact, the corporation is financially sound. Therefore, Plaintiffs are not entitled to the relief they seek under Count VI.

POINT VII

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR CONSPIRACY AND FRAUD

Under Count VII of their Complaint, Plaintiffs make general allegations of conspiracy and fraud. However, they have provided no factual support for their allegations. According to Utah R. Civ. Pro. 9(b), in a claim for fraud, "the circumstances constituting fraud . . . shall be stated with particularity." Here, the Plaintiffs have failed to provided particular facts which would satisfy the elements of an action for fraud. In Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962), the Utah Supreme Court held that a claim consisting of general allegations of false representations, and containing "no allegation whatever of the contents, nature of substance of any alleged false statement" failed to state a claim upon which relief could be granted. Also, in Heathman v. Hatch, 372 P.2d 990 (Utah 1962), the Court held that use of the terms "fraud" and "conspiracy" were general accusations which, without more, could not constitute those actions. Here, the Plaintiffs have made only general accusations regarding fraud and conspiracy. Furthermore, they permitted or engaged in the very activities that they now claim deprived them of their status in the corporation. Therefore, the Plaintiffs are not entitled to the relief they seek under Count VII.

POINT VIII

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR PERMANENT INJUNCTIONS

Plaintiffs also request permanent injunctions enjoining the individual defendants from restricting the Plaintiffs from the property and from access to the books and enjoining them from diminishing the assets of the corporation. The Plaintiffs may not recover under this claim as a matter of law for the same reasons set forth earlier. They are not shareholders, and even if they are, they are barred by the doctrine of clean hands and by equitable estoppel.

Furthermore, there is no factual basis for rewarding such relief. The Plaintiffs have not been denied access to the property or the books of the corporation. Indeed, there are some corporate records that the Plaintiffs have withheld from the corporation. Therefore, the Plaintiffs are not entitled to the relief they seek under Count VIII.

POINT IX

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR BREACH OF CONTRACT AND SPECIFIC PERFORMANCE

Under Count I of their Complaint, Plaintiffs seek damages for breach of an alleged agreement between the parties to employ the Plaintiffs as managers of the business or as officers of the corporation. Even if such an agreement existed, the Plaintiffs may not recover because

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the corporation did not breach the alleged agreement. The Plaintiffs voluntarily resigned and moved from the area.

Similarly, under Count IX of their Complaint, Plaintiffs seek specific performance of the alleged employment agreement. Again, even if such an agreement existed, and if they had not resigned, Plaintiffs, as a matter of law, would not be entitled to specific performance. The agreement they describe is a contract for personal services. Personal service contracts will generally not be specifically enforced. Delivery Service and Transfer Co. v. Heiner, 635 P.2d 21 (Utah 1981). "Courts generally will not specifically enforce an employment contract between an employee and a corporation." O'Neal, Oppression of Minority Shareholders § 9.07 (1985) citing Williston, Contracts § 1423F (3rd ed. 1968). In addition, specific performance is an equitable remedy, and Plaintiffs have come into court with unclean hands.

Therefore, the Plaintiffs may not recover under Count IX.

POINT X

DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE CLAIM FOR JUDICIAL EVALUATION OR DISSOLUTION

Finally, under Count X of their Complaint, Plaintiffs seek judicial evaluation or dissolution of the corporation. The Plaintiffs may not recover under this claim as a matter of law for the same reasons set forth earlier. They are not shareholders, and even if they are, they are barred by the doctrine of clean hands and by equitable estoppel.

Furthermore, under Utah Code Ann. § 16-10a-1430(2) (1996), a shareholder may seek dissolution of a corporation only by establishing either that the directors are deadlocked; the directors have acted or are acting in a manner that is illegal, oppressive, or fraudulent; the shareholders are deadlocked; or the corporate assets are being misapplied or wasted. Here, neither the directors nor the shareholders are deadlocked, and there are no facts supporting the allegations that the directors are acting in an improper manner or that corporate assets are being misapplied. Therefore, the Plaintiffs are not entitled to the relief they seek under Count X.

CONCLUSION

For the reasons stated, the Defendant respectfully requests the Court to grant its Motion for Summary Judgment on Counts I - X of the Plaintiffs' Complaint.

DATED this 9th day of February, 1997.

John L. Valentine

JOHN L. VALENTINE, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendant Swanson
Enterprises, Inc.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 10 day of February, 1997.

Mark K. Stringer, Esq.
Blakelock & Stringer
37 East Center, 2nd Floor
Provo, UT 84606

Jollie Leslie
SECRETARY

J:\JLV\SWAN-SJ.MEM

FILED
FOURTH JUDICIAL DISTRICT COURT
OF UTAH COUNTY, STATE OF UTAH

1997 MAY 13 AM 9:34

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Our File No. 23,628

Attorneys for Swanson Enterprises, Inc.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CHRIS SWANSON and LAURIE SWANSON, Plaintiffs, vs. BEVERLY SWANSON, CLINTON SWANSON, NIKKI SHUMWAY, individually; and BEVERLY SWANSON, CLINTON SWANSON and NIKKI SHUMWAY, all dba SWANSON ENTERPRISES; and SWANSON ENTERPRISES, INC., a Utah business, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 960400307CN Judge Anthony W. Schofield

The above-captioned matter came regularly before the Court on Defendant Swanson Enterprises, Inc.'s Motion for Summary Judgment. No objection to the motion has been filed, although it has been served upon counsel for Plaintiffs in accordance with the Utah Rules of Civil Procedure and the Utah Code of Judicial Administration. Therefore, the Court now makes its Findings of Fact and Conclusions of Law as follows:

(EXHIBIT "EE")

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FINDINGS OF FACT

1. Plaintiffs, Chris Swanson ("Chris") and Laurie Swanson ("Laurie"), and the individual Defendants, Beverly Swanson ("Beverly") and Clinton Swanson ("Clinton"), formed Swanson Enterprises, Inc., March 9, 1995, ("the corporation") for the purpose of owning and operating a restaurant business.

2. The Court finds that the parties originally anticipated that the business would engage in a small remodeling project. The parties agreed that there would be four shareholders, Beverly Swanson, Clinton Swanson, Chris Swanson, and Laurie Shepard-Swanson, with 2500 shares, or 25% of ownership, each.

3. The Plaintiffs were to contribute their services in exchange for their shares in the corporation. They have made minimal or no capital contributions to the corporation. Most of the capital has been contributed by Beverly and Clinton.

4. The parties originally agreed that Chris would be president and a director, and Laurie would be secretary. The parties also originally agreed that Chris would manage the day-to-day affairs of the business, and that neither Chris nor Laurie were to receive compensation until the business was open and profitable.

5. After commencing the remodeling project, the parties realized they would have to construct a new building altogether. This required that Beverly and Clinton contribute a significant amount of property to the corporation as collateral for a loan. The parties also agreed

to include individual Defendant, Nikki Shumway ("Nikki"), as a shareholder and officer. Chris specifically requested her participation because of her experience in the restaurant industry.

6. The Court finds that the parties then agreed to restructure the shares to reflect these changes. Of the total shares, Beverly was to own 39.5%, Clinton, 22.5%, Chris 19%, Nikki, 10%, and Laurie, 9%. The parties also agreed that Beverly would be president, Nikki would be secretary, and that Chris and Laurie would no longer be officers.

7. The Court finds that these changes are reflected in the Corporate Information sheet submitted with the application materials for an SBA loan in August or September of 1995, and that the loan application materials were entirely prepared by Chris.

8. After the parties made these changes, and after the corporation obtained the loan, Chris remained in control of the day-to-day management of the business and of the construction of the building until the time he resigned in December, 1995.

9. The Court finds that Chris retained Laurie as bookkeeper and paid her wages without the authorization of the board of directors. The checks were made payable to Laurie and himself.

10. The Court finds that Chris also made other disbursements of funds without the authorization of the board of directors. These transactions involving corporate funds are documented in records most of which remain in exclusive control of Chris and Laurie. They have refused to relinquish the records and account for several unauthorized disbursements of corporate funds.

11. On two occasions, Nikki discovered receipts of purchases made by the Plaintiffs with corporate funds, and found that the purchases did not add up to the amount the Plaintiffs reported they had spent.

12. Nikki has also recovered cancelled checks written on corporate accounts that the Plaintiffs had used for their personal purposes.

13. The Court finds that around December of 1995, the individual Defendants confronted Chris about the unaccounted for funds, and he resigned. Chris and Laurie no longer perform services for the business by their own choice. They have since moved from the area. There is no further evidence of a conspiracy on the part of the corporation.

14. The Court finds that Chris and Laurie have a key to the restaurant and the individual Defendants have not denied them access to the property, and plaintiffs have never directly asked for disclosure of day-to-day operations of the business.

15. Beverly, Clinton, and Nikki had accountants examine what records they were able to retrieve from the Plaintiffs. The records revealed that Chris and Laurie transferred the funds back and forth between three separate bank accounts. Altogether, about $30,000 to $56,000 of corporate funds remain unaccounted for.

16. Stock certificates were issued April 15, 1996, according to the structure described in ¶ 6 of these Findings of Fact. The Court finds that no other valid stock certificates were issued by the corporation.

17. The Court finds that the corporation is financially sound and free from any danger of insolvency.

18. The Court finds that Nikki has provided competent, ongoing service to the corporation since the beginning of her term as an officer.

19. The Court finds that Chris and Laurie had stored some items of their personal property at the Shumway home. None of it was ever converted to the use of Nikki or of the corporation. It was always available to Chris and Laurie. They have since retrieved the property.

20. The Court finds that since March 20, 1996 Chris has contacted or threatened to contact a number of state agencies and business contacts of the parties, alleging that the corporation has engaged in a variety of violations of the law, in an effort to enhance plaintiffs' bargaining position in this matter.

From the foregoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. Any shares of stock once owned by the Plaintiffs are void for lack of consideration. Any certificates issued by Swanson Enterprises, Inc., to the Plaintiffs shall be recalled and cancelled as void.

2. Plaintiffs are not entitled to the relief they seek under Count I of their Complaint, including the allegation regarding breach of employment agreement, because any such agreement was breached first by the Plaintiffs.

3. Plaintiffs are not entitled to the relief they seek under Count II of their Complaint, including the allegations regarding breach of fiduciary duty and reinstatement of officers and directors, because the Plaintiffs are not shareholders, they are barred by the doctrine of clean hands and equitable estoppel, and they have otherwise failed to comply with the statutory requirements to maintain a derivative action.

4. Plaintiffs are not entitled to the relief they seek under Count III of their Complaint regarding indemnity because they are not shareholders, they are barred by the doctrine of clean hands and equitable estoppel, and an action for indemnity has not arisen.

5. Plaintiffs are not entitled to the relief they seek under Count IV of their Complaint regarding removal of an officer because they are not shareholders, they are barred by the doctrine of clean hands and equitable estoppel, have failed to comply with the statutory requirements to maintain a derivative action, and the court lacks statutory authority to remove an officer for the grounds alleged in the complaint.

6. Plaintiffs are not entitled to the relief they seek under Count V of their Complaint regarding conversion because their personal property was never withheld from them, was never converted to the use of the corporation, and has been retrieved.

7. Plaintiffs are not entitled to the relief they seek under Count VI of their Complaint regarding a receivership or independent management of the corporation because they are not shareholders, they are barred by the doctrine of clean hands and equitable estoppel, and

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the Plaintiffs have failed to show that the corporation has been dissolved, is insolvent, or is in imminent danger of insolvency.

8. Plaintiffs are not entitled to the relief they seek under Count VII regarding conspiracy or fraud because they have failed to provide particular facts to support such claims.

9. Plaintiffs are not entitled to the relief they seek under Count VIII of their Complaint, including allegations regarding a permanent injunction enjoining the individual Defendants from denying the Plaintiffs access to the property and the books, and enjoining the individual Defendants from diminishing the assets of the corporation, because the Plaintiffs are not shareholders and they are barred by the doctrine of clean hands and equitable estoppel.

10. Plaintiffs are not entitled to the relief they seek under Count IX of their Complaint, including allegations regarding specific performance of the alleged employment agreement because they breached first, and because such an agreement may not be specifically enforced.

11. Plaintiffs are not entitled to the relief they seek under Count X of their Complaint regarding a judicial evaluation or dissolution of the corporation because they are not shareholders.

12. The Court hereby grants judgment in favor of Swanson Enterprises, Inc., on the Second Cause of Action (Failure of Consideration) of its Counterclaim, consistent with the ruling under paragraph 1 above.

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13. The Court does not reach a ruling on the Third Cause of Action (Declaratory Judgment) of Swanson Enterprises, Inc.'s, Counterclaim since it has ruled the Plaintiffs own no stock in the corporation.

14. Defendant Swanson Enterprises, Inc.'s, right to recover under the First Cause of Action (Accounting), and Fifth Cause of Action (Malicious Prosecution), of its Counterclaim are hereby reserved for further ruling.

15. Defendant Swanson Enterprises, Inc.'s Motion for Summary Judgment is granted, denying all claims of the Plaintiffs' Complaint against Swanson Enterprises, Inc.

The Court, having entered its Findings of Fact and Conclusions of Law, orders that judgment be entered in accordance therewith.

DATED this 12th day of ~~April~~ May, 1997.

BY THE COURT

ORIGINAL IF IN RED INK

STATE OF UTAH

FOURTH DIST. COURT

Anthony W.

ANTHONY W. SCHOFIELD
DISTRICT COURT JUDGE

NOTICE TO PLAINTIFFS' ATTORNEY AND ATTORNEY FOR THE INDIVIDUAL DEFENDANTS, BEVERLY SWANSON, CLINTON SWANSON, AND NIKKI SHUMWAY

TO: MARK K. STRINGER, ESQ.
THOMAS W. SEILER, ESQ.

You will please take notice that the undersigned, attorney for defendant Swanson Enterprises, Inc., will submit the above and foregoing Findings of Fact and Conclusions of Law to the Honorable Anthony W. Schofield for his signature upon the expiration of five (5) days from the date of this notice, plus three (3) days for mailing, unless written objection is filed prior to that time, pursuant to Rule 4-504 of the Rules of Judicial Administration of the State of Utah.

DATED this 24 day of April, 1997.

JOHN L. VALENTINE, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Swanson Enterprises, Inc.

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 24 day of April, 1997.

Mark K. Stringer, Esq.
Blakelock & Stringer
37 East Center, 2nd Floor
Provo, UT 84606

Thomas W. Seiler, Esq.
Robinson, Seiler & Glazier, LC
80 North 100 West
P.O. Box 1266
Provo, UT 84603-1266

SECRETARY

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Affidavits; time for filing. When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(Amended effective April 1, 1998)

Advisory Committee Note

The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by means other than personal service.

Rule 61. Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Stay of proceedings to enforce a judgment.

(a) Stay upon entry of judgment. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such conditions as it considers proper for the security of the rights of the adverse party.

(d) Stay upon appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in favor of the state, or agency thereof. When an appeal is taken by the United States, the state of Utah, or an officer or agency of either, or by direction of any department of either, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) Stay in quo warranto proceedings. Where the defendant is adjudged guilty of usurping, intruding into or unlawfully holding public office, civil or military, within this state, the execution of the judgment shall not be stayed on an appeal.

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay